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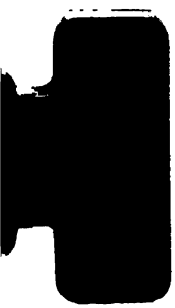
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A

TREATISE

ON THE

LAW OF PRIVATE CORPORATIONS AGGREGATE.

BY

JOSEPH K. ANGELL AND SAMUEL AMES.

Angell Ames
SECOND EDITION.

REVISED, CORRECTED, AND ENLARGED.

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Am
CHARLES C. LITTLE AND JAMES BROWN.

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TO

THE HON. JAMES KENT,

OF THE

STATE OF NEW YORK,

THIS WORK

IS RESPECTFULLY INSCRIBED.

ADVERTISEMENT

TO THE SECOND EDITION.

IN preparing, after an interval of some years, a new edition of this Treatise, we have endeavored to digest, in the body of the work, all the new authorities, English and American, applicable to our subject, which have been reported since the former edition was published, as well as to correct any errors into which we may have fallen. Errors and imperfections may, without doubt, be still found in the work; we can only vouch for zeal and diligence in detecting and correcting them. Some typographical errors have occurred from the fact, that the work has been published at such a distance from us that we have been able to see but one proof; — we know of none, however, which leave any portion of the work unintelligible.

JOSEPH K. ANGELL,
SAMUEL AMES.

Providence, May 15, 1843.

P R E F A C E .

THE reader does not require to be told, that we have in our country an infinite number of corporations aggregate, which have no concern whatever with affairs of a municipal nature. These associations we not only find scattered throughout every cultivated part of the United States, but so engaged are they in all the varieties of useful pursuit, that we see them directing the concentration of mind and capital to the advancement of religion ; to the diffusion of literature, science, and the arts ; to the prosecution of plans of internal communication and improvement ; and to the encouragement and extension of the great interests of commerce, agriculture, and manufactures. There is a great difference in this respect between our own country, and the country from which we have derived a great portion of our laws. What is done in England by combination, unless it be the management of municipal concerns, is most generally done by a combination of individuals, established by mere articles of agreement.

On the other hand, what is done here by the coöperation of several persons is, in the greater number of instances, the result of a consolidation effected by an express act or charter of incorporation. Hence, as has been remarked by a learned Judge,¹ the quantity of that kind of business, which may be brought into our Courts, will be much greater than that which comes before the English Courts. It is true, that there are cited in the following treatise a great number of English cases; but they are generally cases of municipal corporations, referred to for the purpose of illustrating principles which govern bodies politic, whether public or private.

While, therefore, we perceive the reason why so little attention has been devoted by English authors to the law of private corporations, we cannot but be impressed with a deep sense of the importance of this law in our own country. Indeed the inconvenience experienced from the want of a work of reference upon the legal rights and obligations, which grow out of the relations between a body corporate and the public, and between a body corporate and its members, has in this country long been a subject of complaint. The design of the authors, in undertaking their uninviting task, was to supply this deficiency in our *bibliotheca legum*, as far as their qualifications would permit.

¹ The late C. J. Tilghman, of Pennsylvania, in *Commonwealth v. Arrison*, 15 Serg. & Rawle, (Penn.) R. 131.

The first English work, which has professed to be exclusively and systematically devoted to corporation law, is that of Mr. Kyd, published in London in 1793. The author just named assumed to treat generally of the law of corporations ; but his work, for the reasons referred to, is chiefly made up of authorities and precedents that relate to municipal institutions ; and yet, by reporting adjudged cases at length, he has swelled his work into two considerable octavo volumes. The production of Mr. Kyd is very far from meeting the wants of the profession in America at this day ; *first*, because it is confined principally to municipal corporations ; *secondly*, because corporation law had not attained its present perfection in England, when Mr. Kyd wrote ; and *thirdly*, because important changes, both silent and declaratory, have been made in this country, as regards the law of private corporations. It has long been the aim of our courts to apply the old principles of the common law upon the subject of corporations, with such modifications as are suited to the views of an enlightened age. “With the multiplication of corporations,” says one of the Judges of a sister State, “which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law respecting them ;” and he adds, that “this change of law has arisen from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome, because it is gradu-

al, and wisely adapted to the peculiar situation, wants, and habits of our citizens.”¹

Mr. Kyd's work remained for a long time the only English work upon the subject. In 1827, appeared the treatise of Mr. Willcock, which is more limited in its plan than the former; it is not only confined to municipal corporations, but the author avows, that he does not pretend to consider the power of a corporation, to take, hold, and transmit property, make contracts, &c. As far as the treatise of Mr. Willcock goes, it is very faithfully prepared; and we cannot, in justice, refrain from conceding the obligations we owe him for references to English authorities upon the subjects of mandamus and quo warranto, the disfranchisement and amotion of members and officers, and the concurrence required to do corporate acts.

Providence, R. I., Nov. 11, 1831.

¹ Rogers, J. in *Bushel v. Commonwealth Insurance Co.* 15 Serg. & Rawle, (Penn.) R. 176, 177.

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LAW OF PRIVATE CORPORATIONS
AGGREGATE.

INTRODUCTION.

§ 1. THE MEANING AND PROPERTIES OF A CORPORATION. A corporation is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person.¹

The formal definition, which Mr. Kyd has offered of the meaning of a corporation, is as follows; "A corporation, or body politic, or body incorporate is a collection of many individuals united in one body, under a *special denomination*, having perpetual succession under an artificial form, and vested by the policy of the law with a capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued; of enjoying privileges and immunities *in common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence."²

¹ Brown's Civil Law, 99; Civil Code of Louisiana, tit. 10, ch. 1, art. 418;
² Kent, Comm. 215.

³ 1 Kyd, 13.

The following is the more elaborate definition of a corporation, given by Chief Justice Marshall in the celebrated case of *Dartmouth College v. Woodward*.¹ "A corporation," says the Chief Justice, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties, which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are *immortality*, and, if the expression may be allowed, *individuality*; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person, exercising the same powers, would be."

¹ 4 Wheaton, R. 636.

In a subsequent case the same distinguished Judge says ; " The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." ¹

Blackstone defines a corporation to be a *franchise* ; and each individual of the corporation, he says, is also said to have a franchise, or *freedom*. The word " franchise," in its most extensive sense, is expressive of great political rights, as the right of being tried by a jury, the right a man may have to an office, and the right of suffrage. It is in this sense that the word is applied by Blackstone, when defining a corporation, and not in the less general and more appropriate sense of the exclusive exercise of some right, or the sole enjoyment of some profit, as the right to wrecks, or the privilege of a fair, or a market. " A corporation," says Mr. Kyd, " is a political person, capable, like a natural person, of enjoying a variety of franchises ; it is to a franchise, as the substance to its attribute ; it is something to which many attributes belong, but is itself something distinct from those attributes." ²

Franchises, say the Supreme Court of the United States, are special privileges conferred by government on individuals, and which do not belong to the citizens of the country generally by common right ; and, in this country, no franchise can be held, which is not derived from the law of the state. ³

The term *person* in a *statute* embraces not only natural, but artificial persons unless the language indicate that it was employed in a more limited sense.

¹ Providence Bank v. Billings, 4 Peters, R. 562.

² 2 Black. Comm. 37 ; 1 Kyd, 15.

³ Bank of Augusta v. Earle, 13 Peters, (U. S. Co.) R. 519.

A corporation has therefore been deemed a person, within the meaning of the attachment laws of Alabama.¹

The words *corporation* and *incorporation* are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a political institution; the other only the *act* by which that institution is created.

A corporation, we have seen, is a *political* institution merely, and it has, therefore, no other capacities than such as are necessary to effect the purpose of its creation. It cannot be deemed a moral agent, subject to moral obligation; nor can it, like a natural person, be subject to personal suffering. This principle explains many of the incapacities ascribed to a corporation, and without, as Mr. Kyd says, having recourse to the quaint observation, common in the old books, "that it exists merely in idea, and has neither soul nor body."² It is reported by Lord Coke, that C. Baron Manwood demonstrated that corporations have no soul by the following curious syllogism; "None can create souls, but God; but a corporation is created by the King; therefore, a corporation can have no soul." On these principles it is that a corporation cannot be guilty of a crime, as treason or felony.³

The *immortality* of a corporation means only its capacity to take in perpetual succession as long as the corporation exists; so far is it from being literally true that a corporation is immortal, many corporations of recent creation are limited in their duration to a cer-

¹ *Planters &c. Bank v. Andrews*, 8 Port. (Ala.) R. 404.

² 10 Co. 32, b.; 1 Kyd, 71.

³ *Ibid*; 2 Bulst. 233.

tain number of years. A corporation without limitation may be dissolved, and consequently cease to exist, for want of members, voluntary surrender of franchises, forfeiture by misuser, &c.¹ When it is said, therefore, that a corporation is immortal, we can understand nothing more than that it *may* exist for an indefinite duration; and the authorities, which have been cited to prove its immortality in any other sense, do not warrant the conclusion drawn from them.²

Upon the application of the epithet *invisibility* to corporations, which is often met with in the books, Mr. Kyd has bestowed the following just criticism;—
 “That a body framed by the policy of man, a body whose parts and members are mortal, should in its own nature be immortal; or that a body composed of many bulky, *visible* bodies should be *invisible*, in the common acceptation of the word, seems beyond the reach of common understandings. A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind. When, therefore, a corporation is said to be invisible, that expression must be understood of the *right* in many persons collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever, of which natural persons are capable; it is a right of such a nature, that every member, *separately* considered, has a freehold in it, and all, *jointly*

¹ See 2 Kent, Comm. 215.

² 1 Kyd, 17. The passage, cited from Grotius (b. 3, ch. 9, § 3,) in support of the idea of the immortality of corporations, is so far from justifying the conclusion drawn from it, that it proceeds on the supposition that they may cease to exist. Ibid.

considered, have an inheritance which may go in succession."¹

The above criticism will apply to the *intangible* nature ascribed to corporations, and it seems equally impossible to comprehend why a number of bulky persons may not be *touched*, as well as be seen. In one sense, however, a corporation is intangible, and that is, if an execution issue against it, there is no body which can be arrested; for although the officer may both perceive and touch the bodies of the individual members, yet he cannot take the body of either of them by virtue of the execution against the corporate body.² It was held, as long since as the reign of Edward 4, that a corporation could not be imprisoned; and the same doctrine has been since repeatedly recognised.³

§ 2. OBJECT AND USE OF CORPORATIONS. The purpose of endowing companies and societies with the capacity, peculiar to a corporation, is alluded to in the definition, we have offered, of Chief Justice Marshall of the meaning of a corporation. The purpose is indeed at once apparent, when we contemplate an association of natural persons without such capacity. A common union of individuals, it is obvious, is deficient in the coercive authority which is required to render their rules and regulations obligatory. Should the privileges and immunities of such an association become the subject of controversy, there exists no ability of making any defence; and when the members who compose it are

¹ 1 Kyd, 15, 16.

² Nichols v. Thomas, 4 Mass. R. 232.

³ Proprietors of Merrimack River, &c., 7 Mass. R. 186.

dispersed by death, or otherwise, it has not the power to transfer the privileges given to it to other persons. With regard to the power of holding property, — if, for example, a grant of land should be made to twenty individuals not incorporated, the right to the land cannot be assured to their successors, without the inconvenience of making frequent and numerous conveyances. The advantage of a charter of incorporation is exemplified in the case of the Trustees of the Philadelphia Baptist Association,¹ in which case, a citizen of Virginia, in his last will, made a bequest to that society, as a perpetual fund for the education of youths of the Baptist denomination. Although that association had existed for many years before the date of the will, yet it was held by the Supreme Court of the United States, that, as a society, it could not take the trust. Nothing passed to the association but the trust, and that even the individuals were not authorized to carry into effect; as the trust was given to the association forever, and not to the individuals, who composed the association, and their representatives. When, on the other hand, any number of persons are consolidated and united into a corporation, they are then considered as *one person*, which has but one will, — that will being ascertained by a majority of the votes. The privileges and immunities, the estates and possessions of a corporation, when once vested, are vested forever, or, until the end of the period which may be prescribed for its duration; and this important object is effected without any new transfer to

¹ Trustees of the Philadelphia Baptist Association v. Hart, 4 Wheat. R. 1.

² Even the *subsequent* incorporation of the association did not entitle it to the bequest. Ibid.

succeeding members. Persons, who are disposed to make appropriations for any useful purpose, can never fully obtain their object without an incorporating act of the government; and accordingly it has been generally the policy and the custom (especially in the United States) to incorporate all associations, which tend to the public advantage, in relation to municipal government, commerce, literature, and religion. The *public benefit* is deemed a sufficient consideration of a grant of corporate privileges; and hence, when a grant of such privileges is made, (being in the nature of an executed contract), it cannot, in case of a private corporation, be revoked.¹ The object in creating a corporation is, in fact, to gain the union, contribution, and assistance of several persons for the successful promotion of some design of general utility, though the corporation may, at the same time, be established for the advantage of those who are members of it. The principle laid down by Domat is, that the design of a corporation is to provide for some good that is useful to the public.²

§ 3. PUBLIC AND PRIVATE CORPORATIONS. There are various kinds of corporations, which are distinguished by their degrees of power and the object and purpose of their creation; and the members of some corporations are subject to certain liabilities which do not attach to the members of others. It is, therefore, proper, after having explained the meaning and general object of a body corporate, to clear the way to *private* corporations, and to gratify the reader's curiosity, by a pre-

¹ See Black. Comm. vol. 1, p. 467; Dartmouth College v. Woodward, 4 Wheat. 637.

² 2 Domat, Civil Law, 452.

liminary notice of corporations of a different kind. The word *corporation* is, we know, oftentimes significant of a community clothed with extensive civil authority; and a community of that kind is sometimes called a *political*, sometimes a *municipal*, and sometimes a *public* corporation. It is generally called *public*, when it has for its object the government of a portion of the state; and although in such a case it involves some private interests, yet, as it is endowed with a portion of political power, the term *public* has been deemed appropriate. Another class of public corporations are those which are founded for public, though not for political or municipal purposes, and the *whole* interest in which belongs to the government. The bank of the United States, for example, if the stock belonged *exclusively* to the government, would be a public corporation; but inasmuch as there are other owners of the stock, it is a *private* corporation.¹ The distinction between public and *private* corporations will be again explained, in the commencement of the treatise.

§ 4. HISTORY OF MUNICIPALITIES. The effects of the first kind of public corporations (municipalities) upon the destinies of mankind have been of so much importance, that we should hardly be excused in passing them over, without, at least, a general reference to their rise and progress.

The origin of *municipal* corporations may be referred to the earliest institution of political sovereignty; or, in other words, to the first collection of individuals uni-

¹ Dartmouth College v. Woodward, 4 Wheat. 668; 2 Kent, Comm. 222. The first kind of corporations, we have mentioned, are denominated by the Civil Code of Louisiana *political* corporations. Tit. 10, ch. 1, art. 420.

ted for the purpose of a common government. Nations, or states, are denominated by publicists bodies politic; and are said to have their affairs and interests, and to deliberate and resolve in common. They thus become as moral persons, having an understanding and will peculiar to themselves, and are susceptible of obligations and laws.¹ In this extensive sense, the *United States* may be termed a corporation; and so may each State singly; so the king of England is a corporation; and so is Parliament.² The plan of forming, or incorporating inferior and subordinate communities, *imperia in imperio*, such as cities and towns, may be referred to a period nearly as remote. "The same cause," says Domat, "which has linked men together in society, for supplying the wants of every one by the concourse and assistance of many others, has produced the first societies of villages, of boroughs, and of towns."³ We read, too, in the sacred writings, of salt being thrown on the ground where cities *had* stood;⁴ and Pausanias has described the form of founding cities among the Greeks.⁵

When the Roman arms had achieved the conquest of any foreign country, *municipia*, or towns, were established, the inhabitants of which obtained the rights of Roman citizens. Some of these *municipia* possessed all the rights of Roman citizens, except such as could not be enjoyed without residing in the city of Rome. Others enjoyed only the privilege of serving in the Roman legion, but had not the right of electing civil offi-

¹ Vattel, 49.

² 10 Co. 29 b.; 1 Shepard's Abr. 431.

³ 2 Domat, Civil Law, 457.

⁴ Judges, ix. 45.

⁵ Adam's Rom. Antiq. 73.

cers. They used their own laws and customs, which were called *Leges Municipales*; nor did they receive any Roman laws, unless by their own free consent — *nisi fundi fieri vellent*.¹ When a city was to be built in a newly conquered colony, the founder, dressed in a Gabinian garb, marked out its compass by a furrow made with a plough, leaving a space wherever it was intended to erect a gate or *porta*; which operation was attended with certain imposing ceremonies, that are supposed to have been borrowed from the Etrurians.² Sylla, to reward his military officers, first introduced the custom of settling *military* colonies, which was imitated by Julius Cæsar, Augustus, and others. To these colonies whole legions were sent, with their officers, their tribunes and centurions.³ The colonies, it is said, differed from the free towns in this, that they used the laws prescribed by the Romans, but they were governed by similar magistrates. Their two chief magistrates were called *Duumviri*; and their senators *Decuriones*; the latter deriving their name from the circumstance, that when a colony was settled, every *tenth* man was made a senator.⁴

We have been somewhat particular in mentioning the institution of these municipal corporations by the Romans, because they had permanent consequences upon the destinies of future ages. Sir James Mackintosh, in describing the government of Britain when subject to Roman power, tells us, that thirty-three townships were established in that island from Win-

¹ Ibid. 71.

² Ibid. 72, 3; Liv. viii. 16, i. 44; Virg. *Æneid*. v. 755.

³ But this custom afterwards fell into disuse. Tacit. *Annals*, xiv. 72.

⁴ Adam's *Roman Antiquities*, 73, 4.

chester to Inverness, with various constitutions, to the magistrates of which was given the local police, and also a certain share of judicial power. The inhabitants of those townships, it is true, though they had the privileges of Roman citizens, could only exercise them within the walls of Rome, which, says the same elegant writer, "was the sole remaining dignity which seems at last to have distinguished the conquering city from the enslaved world."¹

It is a fact worthy of observation, and one which has been rendered clear by the acuteness and erudition of modern antiquaries, that the municipal corporations, which the policy of the Romans created in Britain, formed the only shadow of government for the half century which ensued the abdication of the government of that country by the Romans. And it is not to be doubted, that the remembrance and remains of them contributed to the formation of those elective governments of towns, which were the foundation of liberty among modern nations.²

In all the countries which had been provinces of the Roman empire, the municipal establishments of the Romans retained some vestiges of those elective forms, and of that local administration, which had been bestowed on them by the civilizing policy of those renowned conquerors. These remains of Roman government, though they were not sufficiently striking to attract the observation of the petty tyrants in whose territory they were situated, yet, beyond doubt, they contributed to prepare the people for more valuable privileges in better times.³

¹ History of England, by Sir James Mackintosh, vol. i. p. 30.

² Ib. 31, 32. Savigny's Hist. of Roman Law, translated by Cathcart, vol. i.

³ Sir James Mackintosh, *ut supra*, p. 204.

When the feudal system had become degenerated, and when the rights which men esteem to be the most valuable in social life were denied, the commercial cities of Italy were incited to throw off their feudal fetters, and to demand a government approximating in a much greater degree to freedom and equality. This laudable and manly spirit was fortunately encouraged by the feeble and imperfect jurisdiction of the German emperors—their distance from Italy—and their engagement in papal controversies. Those cities, accordingly, in the eleventh century, boldly assumed new privileges, and formed themselves into bodies politic, under laws made by their own consent. In some instances sums of money were paid for certain immunities—and in others, they were conferred gratuitously. The passion for liberty had in fact become so general in Italy before the termination of the last crusade, that every city had extorted, or purchased, or received from the generosity of the prince upon whom it had been dependent, a grant of very extensive and important corporate privileges.¹

The example, afforded by Italy, of innovation upon the principles of feudal government was soon followed in France. The policy of conferring new privileges on the towns within his domains was adopted by Louis le Gros,² with the view of curbing the turbulence of his

¹ 1 Rob. Charles V. ch. v. 25, 26. Otto Frisigensis, who is cited by Robertson, thus describes the state of Italy, under Fred. I.—“The cities so much affect, and are so solicitous to avoid, the insolence of power, that almost all of them have thrown off every other authority, and are governed by their own magistrates; insomuch, that all the country is now filled with free cities, most of which have compelled the bishops to reside within their walls; and there is scarcely any nobleman, how great soever his power may be, who is not subject to the laws and government of some city.”

² According to Robertson; but according to Sir James Mackintosh, the

potent vassals. The privileges he bestowed were denominated "charters of community,"—charters which had the effect of enfranchising the inhabitants—abolishing every indication of their servitude—and of forming them into corporations to be governed by ordinances passed by a council of their own nomination. The conduct of the monarch was imitated by the principal subordinate barons, who granted similar immunities to the towns within their own territories. These charters of liberty, owing to the necessity there was of procuring money to defray the expenses attending the expeditions to the Holy Land, were the subjects of bargain and sale; and thus, the consequences of the institution of independent corporate communities, which were repugnant to the maxims of feudal policy, and equally adverse to the sway of feudal power, were disregarded in the eagerness to obtain the "sinews of war."¹ The same practice was soon afterwards adopted in Spain, England, and the rest of the feudal countries. And by this means, as Kent, in his Commentaries observes,— "order and security, industry, trade, and the arts, revived in Italy, France, Germany, Flanders, and England."²

exemption of French towns from feudal tyranny was *extorted* from Louis le Gros. *Hist. of England*, vol. i. p. 205.

¹ The right of sovereignty, however, remained in the King, or Baron, within whose territories the respective cities were located, and from whom they received their charters. See Rob. Charles V. 26, 207.

² 2 Kent, Comm. 218. To the institution of corporations, says the author, may be attributed, in some considerable degree, the introduction of regular government and stable protection, after Europe had for many years been deprived, by the inundation of the barbarians, of all the civilization and science which had accompanied the Roman power.

Mr. Wilcock, in his historical Sketch of Municipalities, which prefaces his Treatise on "Municipal Corporations," observes, that the establishment

In the reign of Henry the First of England, who was a contemporary of Louis le Gros, the inhabitants of London had begun to farm their tolls and duties, and they obtained a royal charter for that purpose. The example of London was soon followed by the other trading towns, and from this time forward the existence of the municipal corporations, called "boroughs," becomes more and more conspicuous.¹ The arrange-

of those corporations "was the effect of that spirit of liberty which had gone abroad, and a considerable degree of power and independence already existing in the cities and towns to which charters were granted. They were already become influential and wealthy associations. Their traffic not only brought them riches, but gave them a maritime power not inconsiderable in those times. Their increasing wealth and commerce established among them the burgher watch and ward, and voluntary associations for the protection of property, not efficient at all times against the rapacity of marauding barons, but capable of repelling those bands of outlaws and disciplined robbers, with whose predatory excursions the annals of European history are frequently stained. The dangers to which their property was exposed taught them the necessity, and they soon learnt the power of union. While the barons were wasting their revenues and retainers in wild wars, and weakening each other with mutual conflicts, the towns were gradually and silently accumulating wealth, population, and power. At a very early period of our history, they were defended by walls. With Italian merchandise they imported the institutes of Venice and Genoa; and commerce with the Hanse towns, then also in their infancy, introduced a similarity of internal arrangement. The grants of privileges contained in the charters were in fact confirmations of privileges already existing. This sanction gave confidence and firmness to the municipalities, with little loss or concession of the lords. It requires no historical documents to convince us, that had they not been already powerful, they would not have been equally favored by the barons and princes, each desiring the assistance of allies in the struggle between prerogative and privilege. The statesmen of those times had little idea of calling new powers into existence; the utmost extent of their policy was to avail themselves of those which they found at hand." — *Wilcock on Municipal Corporations*, 2.

¹ Millar's Hist. Views of Eng. Gov. 340. The free cities of Germany had acquired, in the 13th century, such opulence, as enabled them to form the famous Hanseatic league, which rendered them so formidable to the military powers in their vicinity. Ibid. 344.

ment just mentioned, in relation to tolls and duties, seems to have suggested the first idea of a *borough*, considered as a *corporation*. Some of the principal inhabitants of a town undertook to pay the yearly rent, which was due to the superior, and in consideration of which they were permitted to levy the old duties, and became responsible for the funds committed to their care. As managers of the community, therefore, they were bound to fulfil its obligations to the superior; and by a very natural extension of the same principle, it was finally understood, that they might be prosecuted for all its debts; as they had, of course, a right of prosecuting all its debtors. The society was thus viewed in the light of a body politic, or fictitious *person*, capable of legal acts, and executing every kind of transaction by means of trustees. This alteration in the state of English towns was accompanied with many other improvements; they were placed in a condition that enabled them to dispense with the protection of their superior; and took upon themselves to provide a defence against foreign invaders, and to secure their internal tranquillity. In this manner they ultimately became completely invested with the local government of the place.¹ There are many instances in England of grants by charter to the inhabitants of a town, "that their town shall be a free borough," and that they may enjoy a variety of privileges and exemptions, without any *direct* clause of incorporation; and yet by virtue of such charter such towns have been considered as incorporated.²

¹ See 1 Kyd, 43.

² Ibid. 63, and Madox, Hist. of Exch. 402.

§ 5. QUASI CORPORATIONS. Both towns and other political divisions, as counties, hundreds, &c., which are established without an express charter of incorporation, are denominated *quasi* corporations. In the same class of corporate bodies are included *overseers of the poor*, *supervisors of a county*, *loan officers of a county*, &c., who are invested with corporate powers *sub modo*, and for a few specified purposes only.¹ And the decisions have been, that the successors of such officers may sue for a debt or duty due their predecessors in their official capacity; and also where the same officers contract a debt, by which they become liable to another, and afterwards go out of office, they cannot be sued as *late* overseers, &c., but the action must be against their successors.² In the same class of corporations are also included *school districts*.³ In the Supreme Court of Massachusetts, it was expressly decided, that a school district may sue as a corporation, by its corporate name.⁴

The following extract from the opinion of the late learned Chief J. Parker, in the case just referred to, places in a clear light what is meant by a *quasi* corporation; "That they" (school districts) "are not bodies politic and corporate, with the general powers of corporations, must be admitted; and the reasoning, ad-

¹ 2 Kent, Comm. 221; North Hempstead v. Hempstead, 2 Wend. (N. Y.) R. 109.

² Jackson v. Hartwell, 18 Johns. (N. Y.) R. 422; and see 1 Kyd, 29, 30, 31.

³ Grant v. Fancher, 5 Cowen, (N. Y.) R. and authorities there cited. See also Todd v. Birdsall, 1 Cowen, (N. Y.) R. 258, and the authorities of different States there cited in the reporter's note. City of Lexington v. McQuillan's heirs, 9 Dana, (Ken.) R. 519. In actions against towns each inhabitant is liable. 1 Greenleaf, (Me.) R. 361; Adams v. Wiscasset Bank.

⁴ The inhabitants of 4th School District v. Wood, 13 Mass. R. 192.

vanced to show their defect of power, is conclusive. The same may be said of towns, and other municipal societies; which, although recognised by various statutes and by immemorial usage, as persons, or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law, yet are deficient in many of the powers incident to the general character of corporations. They may be considered, under our institutions, as *qua* corporations, with limited powers, co-extensive with the duties imposed upon them by statute, or usage; but restrained from a general use of the authority, which belongs to these metaphysical persons by the common law. The same may be said of all the numerous corporations, which have been, from time to time, created by various acts of the legislature; all of them enjoying the power which is expressly bestowed upon them, and perhaps, in all instances, where the act is silent, possessing by necessary implication, the authority which is requisite to execute the purposes of their creation.¹ They differ in character, also, from those corporations which exist at common law, in some particulars. It is not necessary that our municipal corporations should act under seal, in order to bind themselves or obligate others to them.² A vote of the body is sufficient for this purpose; and this mode has prevailed with the proprietors of common and undivided land, even in the disposition of their real property, contrary to the general provision of law respecting the transfer of real

¹ See *Jackson v. Hartwell*, 18 Johns. R. 422.

² The doctrine is now well settled, that any corporation may become obligated without the common seal.—See Post, chapters relative to common seal, and the power to make contracts.

estate. It will not do, therefore, to apply the strict principles of law respecting corporations, in all cases, to these aggregate bodies, which are created by statute in this commonwealth. By the several statutes which have been passed, respecting school districts, it is manifest, that the legislature has supposed that a division of towns, for the purpose of maintaining schools, will promote the important object of general education; and this valuable object of legislative care seems to require, in construing their acts, that a liberal view should be had to the end to be effected.”¹

§ 6. SOLE AND AGGREGATE CORPORATIONS. Before proceeding to treat of *private aggregate* corporations, it is proper to mention another general division of corporations, which has relation to the number of persons of which the corporation is composed; and that is, *sole* and *aggregate*.

A *sole* corporation, as its name implies, consists only of *one* person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons.² Corporations of this kind were not known to the civil law, the maxim of the Roman lawyers being “*tres faciunt collegium*.” Yet, even among the Romans, if a corporation *originally consisting* of three persons was reduced to one, (*si universitas ad unum redit*,) it could still subsist as a corporation, “*et stet nomen universitatis*.”³ The King of England

¹ See *Bank of United States v. Dandridge*, 12 Wheat. R. 76; *School Commissioners v. Dean*, 2 Stew. & Port. (Ala.) R. 110; *Lexington (City of) v. McQuillan*, 9 Dana, (Ken.) R. 516.

² 1 Black. Comm. 469. Individuals having perpetual succession, and the capacity of suing and being sued in their political character, have, uniformly, in the books of English law, been called corporations. 1 Kyd, 20.

³ 1 Black. Comm. 469.

is an example of a sole corporation, and so also, it is considered, are the bishops, and vicars, in that country. Thus, the parish minister of a church, in England, is said to be seized, during his incumbency, of the freehold of the land, with which his church is endowed, as *persona ecclesiæ*; and he is deemed capable, as a sole corporation, of transmitting the land to his successors.¹ Fitzherbert and Brook both say, upon the authority of the Year Books, (11 Hen. 4,) that if a grant be made to the church of such a place, it shall be a fee in the parson and his *successors*.²

Sole corporations, it is believed, are not common in the United States. In those states, however, where the religious establishment of the church of England was adopted, when they were colonies, together with the common law on that subject, the minister of the parish was seized of the freehold, as *persona ecclesiæ*, in the same manner as in England; and the right of his successors to the freehold being thus established was not destroyed by the abolition of the regal government, nor can it be divested even by an act of the State legislature. This was held by Mr. J. Story, in giving the opinion of the Supreme Court of the United States, in the case last referred to.

“We are not aware,” says the learned Chief Justice of Massachusetts, “that there is any instance of a sole corporation in this Commonwealth, except that of a person, who may be seized of parsonage lands, to hold

¹ Baron Gilbert, in his treatise on tenures, says that anciently abbots and prelates were supposed to be married to the church, inasmuch as the right of property was vested in the church, and the possession in the abbot or bishop. *Gilb. Ten.* 110.

² Fitz. Feoff. pl. 42; Bro. Estate, pl. 49; cited by Mr. J. Story, in *Town of Pawlet v. Clark*, &c., 9 Cranch, 328.

to him and his successors in the same office, in right of his parish." He adds; "There are some instances in which certain public officers are empowered by statute to maintain actions as successors, such as judges of probate, county and town treasurers; but it is only where it is expressly provided by statute."¹

There are very few points of corporation law applicable to sole corporations. They cannot take *personal* property in succession; and their corporate capacity of taking property is confined altogether to real estate.²

An *aggregate* corporation, as its name will immediately suggest, consists of *several* persons, who are united in one society, which is continued by a succession of members. Of this kind are the mayor and commonalty of a city, the heads and fellows of a college, the members of trading companies, &c.³

¹ *Overseers &c. v. Sears*, 22 Pick. (Mass.) R. 125.

² *Terrett et al. v. Taylor et al.* 9 Cranch, 43. It is considered in England, that there are two kinds of sole corporations; those where the person so denominated has a corporate capacity for his own benefit; and those where he acts only as trustee for the benefit of others. Of the first kind, those best known, and most commonly enumerated, are the king, archbishops, bishops, certain deans and prebendaries, parsons and vicars; and of the same kind were chauntry priests, in days of popish superstition. 10 Co. 27; 4 Co. 65; Cro. Eliz. 464; 1 Kyd, 20. Of the second kind is the chamberlain of London, who may take a recognizance to himself and successors, in his politic capacity, in trust for the orphans. Cro. Eliz. 464; 1 Kyd, 20.

³ 1 Kyd, 76; 2 Kent, Comm. 221.

A
TREATISE
ON
PRIVATE CORPORATIONS.

CHAPTER I.

MEANING, SEVERAL KINDS, AND HISTORY OF PRIVATE AGGREGATE CORPORATIONS.

§ 1. ACCORDING to the several definitions we have in our introduction offered of a corporation, it means an intellectual body, composed of individuals, and created by law; a body which is united under a common name, and the members of which are so capable of succeeding each other, that the body (like a river) continues always the same, notwithstanding the change of the parts that compose it. Within this definition, we have seen, are included *private*, as well as *public* corporations. The latter have been already explained;¹ and we now have occasion to distinguish them more distinctly from the former, in treating upon the law of private corporations. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit; but yet, if the whole interest does not belong to the government, or if the corporation is not created for the administration of political, or municipal power, the corporation is private. A *bank*, for instance, may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation, although it

¹ Introduction.

is erected by the government, and its objects and operations partake of a public nature.

There is a leading case upon this point, the case of the United States Bank *v.* The Planters' Bank of Georgia.¹ C. J. Marshall, who delivered the opinion of the Court, said ; " The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, and not by that of the corporators. The State does not, by becoming a corporator, identify itself with the corporation. The *Planters' Bank of Georgia* is not the *State of Georgia*, although the State holds an interest in it." " It is," he says, " a sound principle, that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

" Generally speaking," say the Court in *Bonaparte v. Camden &c. Rail Road Company*, " public corporations are towns, cities, counties, parishes, existing for public purposes ; private corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, but their use may be public."²

A turnpike company, in which the State holds stock, has been deemed in Pennsylvania not to be such a public corporation as is exempt from the operation of a legislative act, giving jurisdiction to the courts, upon the application of a creditor, to sequester the profits and tolls of the corporation for the payment of its debts.³

A *hospital*, founded by a *private* benefaction, is, in point of

¹ 9 Wheaton, R. 907. In the case of the Bank of S. Carolina *v.* Gibbs, the question was, whether a simple contract debt, due that bank, was a debt due to the public within the provisions of the act relative to executors, and as such, entitled to a preference as a *public debt*. The decision of the court was, that it was not a debt due to the public, and that the Bank could claim no priority on that ground, although the Bank was owned entirely by the State. 3 M'Cord, (S. C.) R. 377. And the Supreme Court of North Carolina said, that the State Bank of that State was a mere private corporation. *State Bank of North Carolina v. Clark, &c.* 1 Hawks, (N. C.) R. 36.

² *Bonaparte v. Camden and Amboy Rail Road Co.*, 1 Baldwin, (Cir. Co.) R. 222.

³ *Turnpike Co. v. Wallace*, 8 Watt, (Penn.) R. 316.

law, a private corporation, though dedicated by its charter to public charity. And a *college*, founded and endowed in the same manner, though for the general promotion of learning, is private.¹ A college, merely because it receives a charter from the government, though founded by private benefactors, it has been held, is not thereby constituted a public corporation, controllable by the government ; nor does it make any difference, that the funds have been generally derived from the bounty of the government itself.²

The trustees of the University of Alabama were held to be a public corporation, because the State had the *whole* interest in the institution, without being under any obligation of contract with any one.³

With regard to *political* corporations, for the government of counties, towns, &c. ; it is true, they involve some private interests, yet, for the reasons already given, they are generally deemed public,⁴ though the decisions concerning them will very frequently apply to the kind of corporations respecting which we are now treating. A private corporation is distinguishable from a municipal corporate body, by having a corporate fund from

¹ Dartmouth College v. Woodward, 4 Wheat. 668. The case of St. Mary's Church, 7 S. and Rawle, (Penn.) R. 559. 2 Kent, Comm. 222.

² Allen v. M'Keen, 1 Sum. (Cir. Co.) R. 276.

³ Trustees, &c. v. Winston, 5 Stew. & Port. (Ala.) R. 17.

⁴ See Introduction, § 3. The Civil Code of Louisiana makes but one general division of corporations, which is *political* and *private*. The first are defined to be "those which have principally for their object the administration of a portion of the State, and to whom a part of the powers of government is delegated to that effect." See Civil Code of Louisiana, tit. 10, ch. 1, art. 420. All other corporations are, by the same Code, *private*, which are divided into civil and religious ; and this distinction results, as well from the quality of the persons who generally compose these kinds of corporations, as from the difference of the object of their establishment. *Civil* corporations are those which relate to temporal police ; such are the corporations of cities, the companies for the advancement of commerce and agriculture, literary societies, colleges or universities founded for the instruction of youth, and the like. *Religious* corporations are those whose establishment relates only to religion ; as the congregations of the different religious persuasions. See same Code — tit. and ch. — art. 421, 422.

which a judgment can be satisfied ; and by the irresponsibility of the members for the corporate debts beyond the amount of their interest in the fund ; for towns, &c. being established only for political and civil purposes, each member of the same is liable in his person and private estate to the execution.¹

§ 2. A corporation is an association quite distinct from *partnership*. The latter is a voluntary contract between two or more persons, for joining together their money, goods, labor, and skill, upon *mere articles of agreement*, that the gain or loss shall be divided proportionably between them ; and which is not confirmed by public authority. To contract such a relation, no charter or license is necessary ; the bare consent of the parties being sufficient, which may be testified either in express terms, as by articles of copartnership, or by tacit and implied assent. In every private unincorporated company, the members are liable for the debts without limitation ; whereas in incorporated societies, they are only liable to the extent of their shares in the stock in trade of the society, and on contracts entered into or made in their corporate character. And a charter is necessary in order to enable the company to sue by a general name ; to have a common seal ; to transmit their rights, privileges, and property to succeeding members without conveyances, &c.² It is frequently the principal object, in this and in other countries, in procuring an act of incorporation, to limit the risk of the partners to their shares in the stock of the association : and prudent men are always backward in taking stock, when they become mere copartners, as regards their personal liability for the company debts. The public, therefore, it is generally deemed, gain by acts incorporating trading associations, as by such means persons are induced to hazard a certain amount of property for the purposes of trade and public improvement, who would abstain from so doing, were not their liability thus limited.

With the view of encouraging persons to an active and useful employment of their capital, a species of partnership has, how-

¹ *Merchants' Bank v. Cook*, 4 Pick. (Mass.) R. 414.

² *Gow. on Part. 5* ; *Hess v. Werts*, 4 S. and Rawle, (Penn.) R. 356.

ever, been introduced in different parts of the world, with a restricted responsibility; though it has never been known in England. In France, by the ordinance of 1673, *limited* partnerships were allowed, by which one or more persons, responsible *in solido*, as general partners, were associated with one or more sleeping partners, who furnished a part of the capital, and were liable only to the extent of the funds furnished. This kind of partnership has been introduced into Louisiana by the Civil Code of that State, under the title of partnership *in commendam*. And, as it has been supposed politic to hold out inducements for adventuring in trade, the same kind of partnership has been authorized in many of our States.¹ But even this kind of partnership, it is at once obvious, is wanting in the properties which distinguish a corporation,² though it comes perhaps nearer to it than any other association of persons, not established by an incorporating act.

§ 3. Private corporations are of several kinds, and are known by certain appellations, according to the objects for which they are created. The first division is into *ecclesiastical* and *lay*.

Ecclesiastical corporations are such as are composed of members, who take a lively interest in the advancement of religion, and who are associated and incorporated for that object. They may be either sole, as a bishop or parson, or aggregate, as, in former times, were the abbot and monks.³ Before the reforma-

¹ 3 Kent, Comm. 12.

² In vol. 2 of a work entitled "Opinions of Eminent Lawyers," (London, 1814,) p. 308, there is a report to the king, signed March 12, 1717, by Northey & Thompson, on a proposed charter to a corporate body for insuring ships. The petitioners for the charter represented, that merchants frequently sustained great loss for want of an *incorporated* company of insurers, with a joint stock to make good all such losses and damages of ships and merchandises at sea, as should be insured by them; and that a company so established would be an encouragement to trade. The advantages, usually supposed to be derived in this country from an act of incorporation, are then set forth by the petitioners. The opinions of eminent merchants are cited, who differ in opinion; but the weight of their opinion was against the policy of an incorporated joint-stock company for the purpose of insurance.

³ Terrett v. Taylor, 9 Cranch, 43. The first sort of corporations, says

tion and the dissolution of monasteries, ecclesiastical corporations were of three kinds. The first consisted of those who were called the secular clergy, that is, a clergy composed of persons having communion with the world, like the modern clergy of England and the clergy of the United States. The second were composed of monks, who were bound by a solemn vow entirely to renounce all intercourse with the world, and to spend their days in common together, under the direction of superiors, and according to regulations prescribed by the founder. The third were religious communities, the members of which, without any vow to relinquish intercourse with the laity, lived together in common, in order to serve the interests and objects of the church; and such were those, who, under the authority of the bishop, were employed as religious missionaries.¹ Ecclesiastical corporations are commonly called, in the United States, *religious* corporations; and that description is given to them in the act of the State of New York, providing generally for the incorporation of religious societies, in an easy and popular manner, and for the purpose of managing with more facility and advantage, the temporalities belonging to the church or congregation.²

Lay corporations are divided into *civil* and *eleemosynary*. *Civil* corporations are created for an infinite variety of temporal purposes, such as affording facilities for the obtaining loans of money; the making of canals, turnpike roads, &c.; and also such as are established for the advancement of learning; for it is now established, that the universities of Oxford and Cambridge, in England, are *civil* corporations, though anciently, they were deemed ecclesiastical.³ It is almost superfluous to say that civil

Ayliffe, in his Treatise on the Civil Law, has a respect unto such persons, whose principal business regards religion, as chapters of cathedral, or collegiate churches, monasteries, and the like; and these are styled *ecclesiastical* corporations. Ayliffe, Civil Law, 196.

¹ 2 Domat, Civil Law, 452.

² 2 Kent, Comm. 221, 222.

³ 1 Black. Comm. 471. The second sort of communities, says Ayliffe, extends itself to those persons who have to do with temporal affairs only, as the colleges and corporations of merchants, tradesmen, and artificers, usually called *companies*; and this sort of corporation he terms *secular*.

corporations are by far the most numerous in the United States, and that the rules of law in relation to them will form the greatest portion of our treatise.

Eleemosynary corporations are such as are instituted upon a principle of *charity*; their object being the perpetual distribution of the bounty of the founder of them, to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent, and sick, or deaf and dumb.¹ And of this kind, also, are all colleges and academies which are founded where assistance is given to the members thereof, in order to enable them to prosecute their studies, or devotion, with ease and assiduity. The reason why the institutions of Oxford and Cambridge are not considered as eleemosynary is, that the stipends which are annexed to particular magistrates and professors are *pro opera et labore*, and are not merely charitable donations, since every stipend is preceded by service and duty.² Dartmouth College, in New Hampshire, on the other hand, is an eleemosynary corporation, because it was founded by private benefactors for the distribution of private contributions.³ And the corporation of Dartmouth College would not be an ecclesiastical corporation, even if it was composed entirely of ecclesiastical persons, because the object of it is not entirely ecclesiastical.⁴

§ 4. The invention of private corporations has been attributed by Sir William Blackstone to Numa Pompilius.⁵ That Numa adopted the policy of subdividing the Roman and Sabine parties into different classes, according to the trades and the manual occupations of the citizens composing those turbulent factions, is a fact very well authenticated.⁶ The formation of such collective bodies by public authority may, however, be traced to the

¹ 1 Kyd, 26; *American Asylum at Hartford v. Phoenix Bank*, 4 Conn. R. 272.

² 1 Black. Comm. 472.

³ *Dartmouth College v. Woodward*, 4 Wheat. 681.

⁴ *Ib.* and 4 Black. Comm. 471.

⁵ 1 Black. Comm. 468.

⁶ *Plutarch's Life of Numa*.

Greeks.¹ It appears from a passage in the Pandects, that private corporations were borrowed from the laws of Solon, which licensed the institution of private companies, subject to the restriction of paying obedience to the laws of the State.² The Romans, it seems, were more jealous of authorizing private combinations, than the Greeks, and hence were more formal in their mode of creating them. They denounced, as *illicit*, every society that had not been constituted by an express decree of the senate or of the emperor.³ And there are many laws from the time of the twelve tables down to the times of the emperors, which were passed against all illicit or unauthorized corporations.⁴ The appellations given by the Romans to the companies of tradesmen, religious societies, &c., which they established, were *universitates*, as constituting one whole out of many individuals; and *collegia*, from being collected together. And here we may perceive the origin of the names of the literary seminaries, at which youth are at this day sent to complete their education, and to be instructed in the liberal sciences.

As we have before intimated, the Romans were strict in requiring the express consent of government to authorize an association with the powers and privileges of a corporate body; and also in dissolving every combination not thus constituted.

It is gathered from Suetonius,⁵ that in the age of Augustus, certain corporations had become nurseries of faction and disorder, and that the emperor interposed, as Julius Cæsar had done before him,⁶ and dissolved all but the ancient and legal corporations, — *cuncta collegia, præter antiquitus constituta distrazit*.⁷ The corporations destroyed by this imperial decree were like the tra-

¹ See Ayliffe's Treatise on the Civil Law, p. 197.

² Digest, 47, 22, 4, cited in 2 Kent, Comm. 216. As the Romans were great borrowers from the Greeks in literature, philosophy, and the fine arts, so were they in jurisprudence; and, indeed, in everything, excepting the art of conquering the world.

³ See 2 Kent, Comm. 216.

⁴ Taylor's Civil Law, 567, 570; Ayliffe, 196.

⁵ Ad. Aug. 32.

⁶ Suet. J. Cæsar, 42.

⁷ 2 Kent, Comm. 217.

ding combinations in England, that existed in London in the year 1180, and which are noticed by Maddox, as having been "set up without warrant from the King," and thus distinguished from warranted, or lawful companies.¹ A singular instance of Roman jealousy, in relation to combinations of individuals not expressly sanctioned by the government, is related by the younger Pliny,² and is thus mentioned by Kent; "A destructive fire in Nicomedia induced Pliny to recommend to the Emperor Trajan the institution, for that city, of a *fire company* of 150 men, (*collegium fabrorum*,) with an assurance, that none but those of that business should be admitted into it, and that the privileges granted them should not be extended to any other purpose. But the Emperor refused to grant it, and observed, that societies of that sort had greatly disturbed the peace of the cities; and he observed, that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail to be mischievous."³

It is evident that the capacities and incapacities of corporations, under our law, bear a strong resemblance to those under the Civil Law; and that the principles of law applicable to corporations, under the former, were borrowed, if not chiefly, in a great measure, from the latter.⁴ It has been considered that the corporations of our own time, which more nearly resemble those of the Romans, are those which have been created in different parts of the United States by charters, that impose upon each member a personal responsibility for the company debts, and, in that respect, resemble an ordinary copartnership.⁵

Wood, it is true, on the authority of the *Digest*, b. 3, t. 4, l. 7, lays it down, that the debts of the whole body are not chargeable on the particular persons composing it.⁶ But that rule, we apprehend, only held in case the corporation was *solvent*; as it is

¹ 1 Anderson, Hist. Commerce, and 1 Kyd, 44.

² Epist. B. 10, Letters 42, 48.

³ See 2 Kent, Comm. 217.

⁴ Ibid.

⁵ Penniman v. Briggs, 1 Hop. Ch. (N. Y.) R. 300.

⁶ Wood's Civil Law, 134.

expressly laid down by Ayliffe, that if a corporation be *insolvent*, the persons who constitute it are obliged by the Civil Law to contribute their private fortunes ; and he refers to the first book of the *Code*. Tit. 3.¹

By the Roman, as well as by the English system of jurisprudence, the division of corporations was into ecclesiastical and lay, civil and eleemosynary. The restraints imposed upon them also bear a striking resemblance to the mortmain and disabling statutes, passed at an early period in England, and since received in the State of Pennsylvania, as the law of that State, — by the force of which, corporations are precluded from purchasing or receiving donations of land, without a license, and also from alienating, without just cause. They were not empowered to act otherwise than by attorney ; the whole were bound by the act of the majority ; and the modes of dissolution were the same as those now recognised, namely, *death, surrender, or forfeiture*.² Corporations for the advancement of learning, however, (or what we denominate colleges,) were entirely unknown to the ancients, and are, says Kent, the fruits of modern invention. But, continues the same author, in the time of the latter emperors, the professors in the different sciences began to be allowed regular salaries from the government, and to become objects of public regulation and discipline. By the close of the third century, these literary establishments, says he, began to assume the appearance of public institutions ;³ and privileges and honors were bestowed upon the professors and students, who were subjected to visitation and inspection, by the civil and ecclesiastical powers. It was not, however, until at least the thirteenth century, that colleges and universities began to *confer degrees*, and to attain the authority and influence they now enjoy.⁴ It is true, there were numerous students at Oxford, and professors who read

¹ Ayliffe, 200.

² 1 Brown, Civil and Adm. Law, 142 ; 8 Wood, Inst. of the Civil Law, 134 ; 2 Kent, Comm. 217.

³ Particularly the schools at Rome, Constantinople, Alexandria, and Berytus. 2 Kent, Comm. 218.

⁴ Ibid.

lectures in grammar, rhetoric, divinity, astronomy, philosophy, &c. ; but still that seminary, like others, was usually called a school, and was not furnished with the power of granting public distinctions, like degrees. The university of Paris was the first which assumed the form of our modern colleges.¹ It would be unjust in us to withhold a passing tribute to the Civil Law for its merit in the advancement and encouragement of literary and scientific seminaries ; for to the honorable passion which universally prevailed, after the discovery of the Pandects at Amalfi, for the study of the Civil Law, is to be ascribed the fact of the resort of such immense numbers to the universities, wherein it was taught, such as Bologna, Oxford, &c. The objects of study in these universities were divided into four branches ; divinity, law, and physic composed three, and the arts and sciences, cemented under one head, formed a fourth.²

The practice of incorporating persons composing particular trades, after the manner of Solon and Numa, has long prevailed in England. A charter is now extant which was conferred by Henry II. to the "Weavers' Company," which granted to them their guild, with all the freedom they had in his grandfather's (Hen. I.) days. A charter was given to "The Goldsmiths" in 1327 ; and another to "The Mercers" in 1393. "The Haberdashers" were incorporated in 1407 ; "The Fishmongers" in 1433 ; "The Vintners" in 1437 ; and "The Merchant Taylors" in 1466.³

Among the secular corporations of the Roman Law were included companies composed of merchants, &c., which embarked in commercial adventures.⁴ The spirit of commercial enterprise,

¹ Brown, Civil Law, 112.

² Ibid. The power or faculty of teaching the arts and sciences was bestowed by the State to the seminary — by the seminary to the individual ; and hence in process of time these branches of learning came to be called *faculties* ; and the criterion or essential difference of an university was the power and license of teaching the four branches, the supposed compass of *university* knowledge ; and accordingly, the college of Dublin is properly an university ; and so is that of Glasgow. Ibid.

³ 1 And. Hist. Commerce, 250 ; Hume, Hist. of Eng. (reign of king John).

⁴ Aycliffe, 196.

which gave rise to the establishment, or perhaps more properly, to the resuscitation of independent towns and cities in modern Europe, led also the way to commercial corporations of a less political character, and which principally consisted of mercantile and other adventurers. To such companies, which had in view their own private emolument, great privileges and monopolies were given, in order to induce them to hazard a considerable portion of their fortunes in the accomplishment of designs of private emolument, which would, it was supposed, at the same time, be beneficial to the government and the nation. We have already seen, that the inhabitants of towns received a variety of privileges and exemptions from the king's charter, and were considered as corporations, although no *express* declaration to that effect was contained in the charter. It has been supposed that the practice of *expressly* incorporating towns and cities by charter in England was introduced in imitation of more private and commercial companies, which, it seems, were known in London soon after the conquest, under the name of *Gilda Mercatoria*.¹ Corporations of the latter kind were known, it seems, at or about the same period on the continent of Europe; for as early as the year 1248, a company of Burgundians received an act of incorporation, in order to induce them to employ their capital for the promotion of objects the tendency of which was to the public benefit.² This company was afterwards translated to England, and there confirmed by Edward I., and received, in the reign of Henry VI., the name of "the Merchant Adventurers."³ The revolutions which happened in the Low-countries towards the end of the sixteenth century, and which laid the foundation of the Republic of Holland, having prevented the company from continuing commerce with their ancient freedom, they were compelled to turn it almost wholly to the side of Hamburg, and the cities on the German ocean; from which the name was

¹ 1 Kyd, 63. Gildam, or Gildan, is a Saxon word, the literal meaning of which is to pay. 8 Co. 125. Merchant guilds certainly did exist before the conquest. Willcock on Mun. Corpor. 3.

² Molloy.

³ And. Hist. of Commerce, 542.

changed to that of Hamburg company, though the ancient title of Merchant Adventurers is retained in all their writings.¹

Commercial corporations have been divided into *regulated* and *joint stock* companies. The former resemble, in every respect, the corporations of trade we have mentioned, as having long existed in London, being such as are common in the cities and towns of all the different countries of Europe, and which are a kind of enlarged monopolies, of the same nature. As no inhabitant of the European cities can exercise an incorporated trade, without first obtaining his freedom in the corporation, so, in most cases, no subject of a state can lawfully carry on any branch of foreign trade, for which a regulated company is established, without first becoming a member of that company. *Joint Stock* companies are composed of persons who seldom know any thing of the business of the company, but who leave the management of it entirely to a body of directors, and are contented with receiving such periodical dividends as the directors think proper to make.²

¹ 1 Greg. Dict.

² Company, in commerce, is defined to be an association of several merchants and others, who unite in one common interest, and contribute by their stock, their council, and their study, to the setting on foot, or supporting, some lucrative establishment. There is also another sort of mercantile associations, called companies, who trade not upon a joint stock, but only enter into a legal contract to carry on particular branches of commerce, under certain regulations. Mortimer on Commerce, 128. On the principle of a free, open, unlimited exercise of trade, domestic and foreign, all public companies, enjoying exclusive privileges, and even incorporated towns and cities, as well as every restrictive subordination in trade, must fall to the ground. But it has been imagined, that the experience of ages has fully demonstrated, that commercial companies and corporations are beneficial; and they have been pronounced by able writers equitable and compatible with a free constitution. See Mortimer on Commerce, 147. The Russian company was first projected towards the end of the reign of Edward VI., and executed in the first and second years of Philip and Mary; but had not its perfection till its charter was confirmed by act of parliament, under queen Elizabeth in 1566. The charter of the Eastland company, incorporated by queen Elizabeth, is dated in the year 1579. The Turkey, or Levant company, had its rise under the same queen in 1581; and so did the celebrated East India company in 1600. The charter of the Hudson's Bay

The Italian states were engaged in commerce as early as the age of Charlemagne, and in the tenth century the Venetians had even opened a trade with Alexandria in Egypt.¹ The first establishment of banking in a regular and systematic form originated with that opulent and enterprising people about the middle of the twelfth century. A "Chamber of Loans" was instituted for the management of the fund, which was raised to relieve the state finances from the embarrassment occasioned by the expensive wars with the empire of the west; and this institution gradually improving in its plan was at length formed into the more perfect institution of the "Bank of Venice."² This celebrated bank served as a model to similar establishments which, in succeeding ages, were founded by the governments of the different states and kingdoms of Europe.

The bank of Genoa commenced in 1407; though previous to this time, the republic borrowed large sums of money from the citizens, assigning certain branches of the public revenue for the

company is dated in the year 1670; and the South Sea company grew out of the long war between England and France, in the reign of queen Anne.

¹ 3 Rob. Hist. Charles V. 273, 274.

² 3 Edin. Encycloped. 217. The term *bank*, in reference to commerce, implies a place of deposit of money. Banks, like most commercial institutions, originated in Italy; where, in the infancy of European commerce, the Jews were wont to assemble in the market places of the principal towns, seated on benches, ready to lend money; and the term *bank* is derived from the Italian word *banca*, (bench). Banks are of three kinds, of *deposit*, of *discount*, and of *circulation*. In some cases, all these functions are exercised by the same establishment; sometimes two of them; and in other instances only one. 1. A bank of deposit receives money to keep for the depositor, until he draws it out. This is the first and most obvious purpose of these institutions. The goldsmiths of London were formerly bankers of this description; they took the money, bullion, plate, &c. of depositors, merely for safe keeping. 2. Another branch of banking business is the discounting of promissory notes and bills of exchange, or loaning money upon mortgage, pawn, or other security. 3. A bank of circulation issues bills or notes of its own, intended to be the circulating currency or medium of exchanges, instead of gold and silver. The Bank of England, the Bank of the United States, and the State banks in this country, are all of them banks of deposit, discount, and circulation. See *Encyclopedia Americana*, vol. I. art. *Bank*.

payment of the interest under the management of a board. The Genoese have been led from this circumstance to assume the merit of establishing a bank as early as the Venetians. In process of time the Genoese saw the expediency of consolidating the public loan into one capital stock, to be managed by a bank, called "The Chamber of St George," to be governed by eight directors, annually elected by the stockholders and creditors. In the year 1444, to prevent the inconvenience of an annual election of directors, eight new governors for the management of the bank were chosen, two only of whom were to go out every year.¹

It was several centuries before any other banks than those above mentioned were established in Europe; and it was not until the year 1609, that the example of Venice and Genoa was followed by the great commercial city of Amsterdam. On the thirty-first of January in that year, the Bank of Amsterdam was established, by a declaration of the magistrates of the city under the authority of the States, that they were the perpetual cashiers of the inhabitants, and that all payments above 600 guilders, (but afterwards reduced to 300,) and bills of exchange, should be made in the bank. The beneficial effects of this establishment by the Dutch were soon perceived, and bank money immediately bore a premium.²

In the year 1694 the charter was granted by William and Mary to the "Bank of England," which for opulence and the extent of its circulation is now one of the most considerable in the world. The projector of this Bank, (William Patterson, a Scotchman,) it is said, took for a model the Bank of St George, in Genoa. The charter was granted for the term of twelve years; and the corporation was determinable on a year's notice. A governor, deputy governor, and twenty directors, are annually elected from the proprietors, but not above two thirds of the directors for the preceding year can be chosen. The last renewal of the charter of the Bank of England was in the 40th year of the reign of George III., when, on certain conditions, it was continued

¹ 3 Edin. Encycloped. 217.

² Or *agio*, which is a term to denote the difference of price between the money of the bank and the coin of the country. 3 Edin. Encycloped. 217.

to the first of August, 1833. By the act which originally constituted this bank, as well as by the various subsequent statutes, numerous privileges are conferred on the governor and company ; and salutary restrictions interposed for the protection and welfare of the institution. They are authorized to purchase and hold lands, with all the powers incident to other corporations. The stock is accounted as personal, and not as real estate, and goes to the executor, and not the heirs. All contracts, or agreements for buying or selling stock, must be registered on the books of the Bank, within seven days, and the stock transferred within fourteen, after such contracts have been entered into.¹

§ 5. It would be a much more easy task to enumerate the corporations of the aggregate, and not of the municipal kind now existing in Europe, than it would be to enumerate those now established in the United States. In no country have corporations been multiplied to so great an extent, as in our own ; and the extent, to which their institution has here been carried, may very properly be pronounced "astonishing."² There is scarcely an individual of respectable character in our community, who is not a member of, at least, one private company or society which is incorporated. If a native of Europe, who has never traversed the wide barrier which separates him from us should be informed, even with tolerable accuracy, of the number of Banking Companies, Insurance Companies, Canal Companies, Turnpike Companies, Manufacturing Companies, &c, — and of the literary, religious, and charitable associations, that are diffused throughout these United States, and fully invested with corporate privileges, he could not be made to believe that he was told the truth. Two centuries, he would say, have scarcely elapsed since civilized man first found the country a wilderness, wherein the unlettered savage roamed in unmolested freedom.

Acts of incorporation are moreover continually solicited at every session of the legislature, and there is no reason to believe

¹ Ibid. 219.

² 2 Kent, Comm. 219.

but that hundreds of new charters will soon be added to the present mighty mass. The New York convention, in the year 1821, attempted, says Judge Kent, "to check the improvident increase of corporations, by requiring the assent of two thirds of the members elected to each branch of the legislature, to every bill, for creating, continuing, altering, or renewing, any body politic or corporate." Even this provision, as we are told by the same author, "failed to mitigate the evil;" and he refers the reader, for an instance of the failure, to the session of the New York legislature of 1823, that is, the first session after the operation of the check just mentioned. At that session *thirty-nine* new private temporal corporations were instituted.¹

Kent says, "that the multiplication of corporations in the United States, and the avidity with which they are sought, have arisen in consequence of the power which a large and consolidated capital gives them over business of every kind; and the facility which the incorporation gives to the management of that capital, and the security which it affords to the persons of the members, and to their property not vested in the corporate stock."² And the remark made by Mr. J. Duncan, of Pennsylvania, viz. that that State "was an extensive manufacturer of home-made corporations,"³ will apply, as our readers well know, to every State in the Union.

¹ 2 Kent, Comm. 219.

² Ibid.

³ *Bushell v. Commonwealth Ins. Co.* 15 Serg. & Rawle, 186.

CHAPTER II.

IN WHAT MANNER AND BY WHOM PRIVATE CORPORATIONS
MAY BE CREATED.

§ 1. IN the enactments of legislative bodies, where natural persons are spoken of, no other than natural persons will be intended, unless it be absolutely necessary to give effect to some powers already conferred on artificial persons, which it is necessary should be executed to carry into effect the object contemplated in their charter.¹

By the Civil Law no corporation could be created without the express approbation of the sovereign, after a satisfactory explanation of their usefulness and tendency to promote the public good. And by that law a license is required, in the words of Domat, "to establish corporations and communities, ecclesiastical or temporal, regular or secular, and of all other kinds whatsoever; and it is only the sovereign who can grant this leave, and approve the communities and corporations to whom the right of assembling themselves together may be granted."² It has, however, been laid down, as the reader will probably recollect, by Blackstone,

¹ Blair v. Worley, 1 Scammons, (Ill.) R. 178.

² 2 Domat, Civil Law, 298, 9. Mandatis principalibus præcipitur præsidibus provinciarum, ne patiuntur esse (collegia, sodalitia) neve milites collegia in castris habeant, l. 1, ff. de colleg. and corp. Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur. Nam et legibus et senatusconsultis, et principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt hujusmodi corpora; ut ecce vectigalium publicarum sociis permissum est corpus habere; vel auri fodinarum, vel argenti fodinarum, et salinarum. Item collegia Romæ certa sunt quorum corpus senatusconsultis atque constitutionibus principalibus confirmatum est; veluti pistorum et quorundam aliorum et naviculariorum. l. 1, ff. quod cuj. un. nom. And see also Civil Code of Louisiana, Sit. Corpor.

that corporations *seem* to have been erected by the Civil Law by the mere act and voluntary association of the members, provided such convention was not contrary to law ; and it does not appear, he says, that the Prince's consent was necessary. Blackstone is doubtless correct as to temporary societies, or mercantile partnerships, formed for the interests of particular persons, and to continue during their lives ; but as to corporate communities, intended to be permanent like the corporations of the present day, the rule of the Civil Law was, that they could not exist unless confirmed by the sovereign power.¹

§ 2. Several modes are pointed out by which corporations may be created in England, but all of them may be resolved into a license from the government, either expressed or implied. In England, it is true, during the latter part of the Saxon period, and for some time after the conquest, the power of conferring corporate privileges was exercised by the nobles, within their respective demesnes. And there are many instances of towns within the territorial limits of the feudal barons, which had enjoyed such privileges by charters from their immediate lords ; which privileges having come to the crown by escheat, were confirmed.² That the King, however, very soon after the conquest, was understood to possess the exclusive prerogative of creating *guilds*, appears from the circumstance, that many companies of a commercial character were suppressed about that period, as *adulterine* guilds ; that is, corporations set up without the royal or government warrant and authority.³ In the time of Bracton, who lived in the reign of Henry III. and Edward I., the King's prerogative as to the exclusive privilege of granting liberties and franchises in general, seems to have been fully established ;⁴ and the absolute necessity of the King's assent to the

¹ See Brown's Civil Law, 101, 102 ; The Digest, 47, Lib. 22, 23, says expressly, that every corporation is illegal, *nisi ea vel Senatus Consulti auctoritate vel Caesaris coierit*. And see Dig. Lib. 47, tit. 22.

² 1 Kyd, 42 ; Miller on Eng. Gov. 149.

³ 1 Kyd, 44.

⁴ Bract. 1, 2, ch. 24, f. 55, 56.

institution of any corporation was held, in the reign of Edward III. to have been previously settled as clear law.¹ The method by which the King's assent is expressly given is either by *act of parliament* (of which the royal assent is a necessary ingredient) or by *charter*. The King alone, when a corporation is intended with privileges, which, by the principles of the English Law, may be granted by the King, is qualified to create it by his sole charter. When, on the other hand, it is intended to establish a corporation vested with powers which the King cannot of himself grant, recourse must be had to an act of parliament; as if it be intended, for example, to grant the power of imprisonment, as in the case of the College of Physicians; or to confer a monopoly, as in the case of the East India Company;² or when a court is

¹ Bro. Corpor. 15; 10 R. 33. The Pope was never competent to create a corporation in England. At the time of the reformation, in consequence of the statute 1 Edw. VI. which gave the colleges therein described to the king, it generally became a question whether the house claimed was a lawful college; the determination of which depended upon the authority by which it was established. 1 Kyd, 44. In the case of Greystock college, it appeared that Pope Urban, at the request of Ralph, baron of Greystock, founded a college of a master and six priests, resident at Greystock, and assigned to each of the priests five marks per annum, besides their bed and chamber, and to the master forty pounds per annum; and it was certified in the book of the first fruits and tenths, that this college was in being within five years before the making of the statute; and it was resolved by the justices, that this *reputative* college was not given to the king by that statute, because it wanted a *lawful beginning*, and the countenance also of a lawful commencement, for that the Pope could not found or incorporate a college within the realm, nor assign nor license others to assign, temporal living to it; but that it ought to be done by the king himself, and by no others. Dyer, 81, pl. 64; 4 R. 107.

² Mr. Burke, in his speech on the India bill in considering that objection, which was made to the bill on the ground of its being an attack on "the *chartered* rights of men," observed, that that phrase was unusual in the discussion of privileges conferred by a charter like that of the East India Company. If the *natural* rights of men, he said, are clearly defined by express covenants, and secured against power and chicane, it is a formal recognition, by the sovereign power of an original right in the subject; and that the charters, which by distinction are called *great*, are public instruments of this nature, as, for instance, the charters of king John and king Henry III. But

erected, with a power to proceed in a manner contrary to the rules of the common law.¹ Until late years, most of the parliamentary acts creating corporations, confirm such as were before created by the King alone without authority, as in the case of the College of Physicians constituted by Henry VIII.²

The assent of government may be given constructively or presumptively, as well as expressly. In a case in England, where it manifestly appeared, from the different clauses of several local legislative acts, that conservators of a river navigation should take land by succession, and not by inheritance, although they were not created a corporation by express words, they were so by implication; and that being so, they were entitled to sue in their corporate name for an injury done to their real property.³

The associations formed under the *general* banking law of New York, of 1838, are corporations,⁴ and the corporations, which are said in the English books to have been created by the *common law* and by *prescription*, all imply the sanction of government. The corporations, existing in England by virtue of the common law, are supposed to have been warranted by the concurrence of former governments; common law being in fact, nothing more than custom arising from an universal assent. The tenure of the King, and of all bishops, parsons, &c. to their respective offices, is founded on the principle just stated.⁵ So also in the case of corporations, which are said to exist by *prescription*, such for example as the corporation of the city of London, and others which have enjoyed and exercised corporate privileges, from time immemorial, they are in the eye of the law well founded; for though no legal charter can be shown, yet

there may be, and are charters of a different nature. *Magna Charta* is a charter to *restrain* power; but the East India charter and other charters which have been granted are to *create* power. Burke's Speech on the India Bill.

¹ 1 Kyd, 61; Cro. Car. 73, 87.

² 8 R. 114.

³ *Tone Conservators v. Ash*, 10 Barn. & Cresw. 349.

⁴ *Bank of Watertown v. Assessors*, 25 Wend. (N. Y.) R. 686.

⁵ 1 Black. Comm. 472; 1 Kyd, 39; *Town of Paulet v. Clark*, 9 Cranch,

the legal presumption is, there once was a charter, which, owing to the accidents of time, is lost or destroyed.¹

§ 3. Corporations may exist in the United States by an implied assent of the power competent to create them, as well as in England. And the common law, so far as it relates to churches in this country of the episcopal persuasion, — the right to present to such churches, — and the corporate capacity of the parsons thereof to take in succession, has been expressly recognised by the highest authority.² It may be considered well settled too, that a corporation may exist in this country by *prescription*. In Massachusetts, where no act of incorporation could be found of a parish, which had existed more than forty years, evidence was admitted, to prove its incorporation by reputation.³ And in another case in the same state, parol proof, tending to show the existence of an act incorporating a town with

¹ Ibid.; 2 Inst. 330. A corporation by prescription is a corporation, which has existed from time immemorial, and of which it is impossible to show the commencement by any particular charter or act of parliament, the law presuming that such charter or act of parliament once existed, but that it has been lost by such accidents as length of time may produce. 1 Kyd, 41.

² *Town of Paulet v. Clark et al.* 9 Cranch, 294. The church entitled must be a church recognised in law for this particular purpose. Whenever, therefore, previous to the revolution, an episcopal church was duly erected by the crown, the parson thereof regularly inducted, had a right to the glebe in perpetual succession. Where no such church was duly erected by the crown, the glebe remained as an *hereditas jacens*, and the state which succeeded to the rights of the crown might, with the assent of the town, alien or encumber it; or might erect an episcopal church therein, and collate either directly, or through the vote of the town, indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiæ*, and be a corporation capable of transmitting the inheritance. Such were the rights and privileges of the episcopal churches of New Hampshire, and the legal principles applicable to the glebes reserved in the various townships of that State previous to the revolution. And without an adoption of some of the common law, it seems difficult to support the royal grants and commissions, or to uphold that ecclesiastical policy, which the crown had a right to patronize, and to which it so explicitly avowed its attachment. *Ib.* See also *Terrett et al. v. Taylor et al.* 9 Cranch, 43.

³ *Dillingham v. Snow*, 7 Mass. R. 547.

the ordinary powers and privileges, was deemed admissible at the expiration of thirty years.¹ It may indeed be safely relied on as a sound proposition, that when an association of persons have for a long time acted as a corporation, have been uniformly recognised as such, and rights have been acquired under them as a corporation, the law will countenance every presumption in favor of its legal corporate existence.² But it will be at once obvious, that if the acts and proceedings of any company or association, of long standing, consist only of such acts and proceedings as might be performed without an incorporating act, a grant of such an act cannot be inferred; and this is not only agreeable to the general rules and analogies of the law, but has moreover been expressly so held by the Supreme Court of Connecticut.³

Whenever it appears, that a charter has been granted to certain individuals to act as a corporation, who are in the actual possession and enjoyment of the corporate rights granted, they have been held as rightfully in such possession and enjoyment against wrong doers and all others, who have treated or acted with them in their corporate character; and even if it be shown that the charter was granted on a precedent condition, and persons are found in the quiet possession and enjoyment of the corporate rights, as against all, but the sovereign, the precedent condition shall be taken as performed.⁴

Although corporations, as we have just observed, may exist in this country by common law and by prescription, yet there are comparatively but few cases, where a legislative act or charter cannot be shown. The state legislatures in the United States have for many years past, and in very numerous instances, exercised the right of granting corporate privileges both to public and to private companies. The competency of the legislative power

¹ *Stockbridge v. West Stockbridge*, 12 Mass. R. 400.

² *Hagerstown Turn. Co. v. Creeger*, 5 Har. & Johns. (Md.) R. 122; *Shrewsbury v. Hart*, 1 C. & Payne, 113. By virtue of prescription a corporation may have more than one corporate name. *Id.*; 1 Hall, (N. Y.) R. 141; *Trott v. Warren*, 2 Fair. (Maine) R. 227.

³ *Green v. Dennis*, 6 Conn. R. 302.

⁴ *Tar River Nav. Co. v. Neal*, 3 Hawks, (N. C.) R. 520.

of a State to create corporations, with powers which are not repugnant to the constitution of the United States and the acts of Congress, and which do not conflict with the powers of the General government, is so clear, so generally admitted, and has been so long and so often claimed and exercised, that it is unnecessary to offer any arguments or authorities for its support. As is observed by the Supreme Court of the United States, in the case of *M'Culloch v. State of Maryland*, "a corporation must be considered not less usual, not of higher dignity, not more requiring a particular specification, than other means. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this."¹ It was held in the State of Tennessee, that the incorporation of banking institutions not being within any prohibition of the constitution of that State, remained to be exercised by the legislature, as one of its incidental powers.²

§ 4. The question, whether the Congress of the United States can create a corporation, has received the grave consideration of some of our most eminent statesmen and learned judges. The reply of Mr. Hamilton, when Secretary of the Treasury, to the objections of the Secretary of State and the Attorney General, to the establishment of a national bank, which objections were founded on a general denial of the authority of Congress to erect corporations, is clear, able, and convincing. Mr. Hamilton commenced his argument by advancing the broad principle, that every power vested in a government is in its nature **SOVEREIGN**, and includes, by *force* of the *term*, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power, and which are not precluded by restric-

¹ *M'Culloch v. State of Maryland*, 4 Wheat. 421.

² *Bell v. Bank of Nashville, Peck*, (Tenn.) R. 269.

tions and exceptions specified in the constitution ; or not immoral, or not contrary to the essential ends of political society. This principle in its application to government in general, he doubted not, would be admitted as an axiom ; and, therefore, he considered it incumbent on those, who might incline to deny it, to prove a distinction, and to show, that a rule which, in the general system of things, is essential to the preservation of the social order, is inapplicable to the United States. The circumstance, that the powers of sovereignty are, in this country, divided between the national and state governments, did not afford the distinction required ; and it did not follow, he contended, from this circumstance, that each of the portions of power, delegated to the one or the other, is not sovereign with regard to its proper objects. It would only follow from it, that each has sovereign power as to *certain* things, and not as to *other* things. To deny, he said, that the government of the United States has a sovereign power as to its declared purposes and trusts, because its power does not extend to all laws, would be equally to deny, that the state governments have sovereign power in *any* case, because their power does not extend to *every* case. But if it was deemed necessary to bring proof to a proposition so clear, as that which affirms that the powers of the federal government, as to its objects, are sovereign, the clause in the constitution would be decisive ; the clause which declares, that the constitution, and laws of the United States made in pursuance of it, shall be the *Supreme Law of the Land*. The power then, he argued, which would create the supreme law of the land, in any case, was doubtless sovereign as to such case ; and that this general and indisputable principle at once put an end to the question whether, the United States have power to create a corporation. For it is unquestionably incident to sovereign power to create corporations ; and consequently, to the sovereign power of the United States, in relation to the *objects entrusted to the management of the government*.¹

¹ For a continuance of this luminous and forcible argument of Mr. Hamilton, see the reasons submitted by him, according to the order of the President, in favor of the constitutionality of a National Bank. 1 Hamilton's Works, iii. See also the Report of Mr. M'Duffie.

The above reasoning of Mr. Hamilton was subsequently sustained by a decision of the United States Supreme Court. That court held, that the power of Congress, to carry into execution the powers which belong to it by the creation of a corporation, was within the scope of the constitution : that whenever, in fact, the end of a state or of the general government is legitimate, *all the means* which are appropriate and plainly adapted to the end, (and are not expressly prohibited, and are consistent with the letter and spirit of the constitution,) are clearly allowable ; and, that any law, which is not denied to Congress, and which is really calculated to effect any of the objects entrusted to Congress, (as for instance the incorporation of a national bank,) is in pursuance of the constitution.¹ That Mr. Madison entertained no doubt of the constitutionality of a national bank would seem from his message of December, 1815.²

¹ *M'Culloch v. State of Maryland*, 4 Wheat. 424.

² *Presidents' Speeches*, p. 329. Mr. Madison, it is true, opposed the charter of the old bank, in 1791, as unconstitutional ; yet he acknowledged himself bound, as President, to yield his opinion to the exposition of precedents. When he returned the United States Bank Bill, on the 30th of January, 1815, with his reasons (on account of its inexpediency) for not signing it, he says ; "Waiving the question of the constitutional authority of the legislature to establish an incorporated bank, as being precluded in my judgment by repeated recognitions, under varied circumstances, of the validity of such an institution, in acts of the *legislative, executive, and judicial* branches of the government, accompanied by indications in different modes of the concurrence of the general will of the nation, &c. (*Senate Journal*, 3d Session, 13th Congress, p. 309.) And see Notes to the Speech of Mr. Grimke of South Carolina, delivered in December, 1828, on the constitutionality of the Tariff, and on the true nature of State sovereignty. This speech was delivered in the Senate of South Carolina. It may not be improper to recall the reader's recollection to the *origin* of the Bank of the United States. In May, 1781, the superintendent of finance laid before the Congress a plan of a bank ; and on the 26th of that month, the resolutions concerning it were passed by Congress. The Congress resolved, that they approved of the plan of a bank submitted to their consideration by Mr. Robert Morris : That the subscribers to the bank shall be incorporated under the name of "The President, Directors, and Company of the Bank of North America ;" That it be recommended to the several States, to provide, that no other bank shall be established or permitted within the States during the

§ 5. It was formerly asserted, that in England the act of incorporation must be the *immediate* act of the King himself, and that he could not grant a license to another to create a corporation.¹ But the law has since been well settled to the contrary; and the King may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely.² This is on the principle that *qui facit per alium, facit per se*; and the persons, to whom the power of establishing corporations is delegated, are only an instrument in the hands of the government.³ In this manner the chancellor of the university of Oxford is authorized to grant corporate privileges, and has, by virtue of such authority, created several matriculated companies of tradesmen.⁴ A similar power has been delegated by the legislature of Pennsylvania with regard to churches.⁵ The acts of the instrument, in these cases, become the acts of the mover, under the familiar maxim above mentioned.

war: That the notes thereafter to be issued by the bank, payable on demand, should be receivable in payment of all taxes, duties, and debts payable to the United States: That Congress will recommend to the legislatures of the States to pass laws, making it felony for any person to counterfeit bank notes, or to pass them, &c. Under these resolutions a subscription was opened for the national bank, and before the end of December, 1781, the subscription was filled, from an expectation of a charter of incorporation from Congress. The charter was granted by Congress with a recommendation to the legislatures of each State, to pass such laws as they might judge necessary for giving its ordinance full operation. This recommendation was complied with by Pennsylvania, on the 18th of March, 1782; by Rhode Island, in January, 1782; and by Massachusetts, in January, 1782. See Lectures of Hon. James Wilson, one of the Judges of the U. States Supreme Court, and Professor of Law in the College of Philadelphia, (vol. iii. p. 397.)

¹ 10 R. 27.

² 1 Kyd, 50.

³ 1 Black. Comm. 473.

⁴ Ib.

⁵ 3 Penn. Laws, 40; Case of St. Mary's Church, 7 S. & Rawle, (Penn.) R. 517. Before the revolution, charters of incorporation were granted by the proprietaries of Pennsylvania, under a derivative authority from the crown; and those charters have been recognised since the revolution. 3 Wils. Lect. 409.

§ 6. No precise form of words is necessary in the creation of a corporation.¹ And if the words "soud," "erect," "establish," or "incorporate" are wanting, it is not material.² It was held in ancient times, if the King granted to a vill *gildam mercatoriam*, it was by such grant incorporated.³ So if the King granted to a vill to be quit of toll, it was, for that purpose, incorporated. Or if he granted lands to them, he gave them a corporate capacity to take, if a rent was reserved.⁴ And, in England, there are many instances of grants by charter to the inhabitants of a town "that their town shall be a *free borough*," and that they shall enjoy various privileges and exemptions, without any direct clause of incorporation; and yet by virtue of such charter, such towns have been uniformly considered as incorporated.⁵ These authorities go to establish that, whenever it is manifestly the intention of the government to confer corporate privileges, they may be conferred without the adoption of any particular technical phraseology.⁶ In all grants of corporate privileges to private companies, and associations, not of a municipal character, the word "incorporate" is generally, however, by the legislature adopted.

In a case in Pennsylvania, it was supposed, that "*the Farmer's Bank of Lancaster*," was virtually incorporated by the "Act relating to the association of individuals for the purpose of banking." By that law it was enacted that, if any association of

¹ *Rex v. Amery*, 1 T. R. 575.

² 10 Co. 40. b.

³ 1 Rol. 513.

⁴ 4 Com. Dig. Tit. *Franchises*, (F. G.)

⁵ *Ib.* The grant of *gilda mercatoria*, it seems, however, did not invest the grantees with the local government of the place; for a *gilda mercatoria* established in a town might be distinct from the general corporation of the town. 1 Kyd, 64. And in most of the royal boroughs in Scotland, there are several incorporated companies of trades, and a gildry, which is also an incorporated company, but distinct from the others; and the magistracy of the town is composed of members partly taken from the gildry, and partly from the traders. 1 Kyd, 65.

⁶ 1 Kyd, 63; *Minot v. Curtis*, 7 Mass. R. 441; *Denton v. Jackson*, 2 Johns. (N. Y.) Ch. R. 320. In New York the *loan officers* and supervisors of a county are endowed with a corporate capacity. *Ib.*

citizens should thereafter be formed for the purposes of banking, every member thereof should be individually and personally liable for the debts of the association. The court held, that this provision could not be construed into an *implied* incorporation of the bank above mentioned, or of any other company. The court were of opinion, that the most that could fairly be inferred was, that the act was an acknowledgment, that such associations were lawful until prohibited by the legislature. The intent of the law, the court said, was to prevent associations that were about to be formed, the members whereof endeavored to shield themselves from personal responsibility, by publishing to the world, that they undertook to transact business on the express condition of being exempt from such responsibility. And the court asked, how it could be supposed for a moment, that there should be an intention to incorporate associations, without number and without end, free from all restraint and limitation, when in no instance had a banking company been incorporated, before or since, without restriction as to the amount of its capital, the nature of its business, and the extent of its duration.¹

§ 7. Something more than the mere *grant* of a charter is necessary to create a corporate body ; for it is necessary that the charter should be *accepted*, in order to give it full force and effect; as the government cannot compel persons to become incorporated without their consent. The intention of a grant of incorporation is to confer some advantage upon the grantees ; but as the grant may be counterbalanced by the conditions which accompany it, the grant must be accepted by a *majority*, at least, of those who are intended to be incorporated. Mr. Justice Wilmot, said, in the case of *Rex v. Vice Chancellor of Cambridge*,² — “ It is the *concurrence* and acceptance of the university that gives the *force* to the charter of the crown.” It is said also, in another case in Great Britain, “ the crown cannot *oblige* a man to be a corporator

¹ *Myers v. Irvin*, 2 S. & Rawle, (Penn.) R. 368. See *Bank of Watertown v. Assessors*, 25 Wend. (N. Y.) R. 686; *Jackson v. Bank of Marietta*, 9 Leigh, (Virg.) R. 302.

² *Rex v. V. Chan. Cambridge*, 3 Burr. 1661.

without his consent ; he shall not be subject to the inconveniences of it, without accepting of it and assenting to it.”¹ The same principle has been recognised by the Supreme Court of Massachusetts, in a case where the court say, “that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities.”² A grant of incorporation is in fact in the nature of a *contract* between the government and its subjects, the latter of whom undertake, in consideration of the privileges bestowed, to do what the government is interested in having done. The terms offered by the government may therefore be acceded to, or refused by the intended body corporate, and if not acceded to, have no binding effect.³ Even the inhabitants of a town, it was long ago held, could not be incorporated without the consent of the *major* part of them.⁴

Having made it appear that an acceptance of the charter is necessary, we next proceed to show what will amount to an acceptance, and how it may be proved. The question, whether a charter has been accepted, will of course depend upon the circumstances under which it was granted. If a particular

¹ King v. Passmore, 3 T. R. 240.

² Ellis v. Marshall, 2 Mass. R. 279.

³ Dartmouth College v. Woodward, 4 Wheat. 518 ; and see also Lincoln and Ken. Bank v. Richardson, 1 Greenl. (Me.) R. 79 ; Fire Department v. Kip, 10 Wend. (N. Y.) R. 266.

⁴ 2 Brownl. 100. There is a difference, however, between a charter granted in general terms to incorporate the inhabitants of a city, and a charter which creates distinct parts of the corporate body, fills up some of the offices by name, and leaves it open to them to elect a number of freemen. As, where the king appointed a certain number of aldermen and common-council men, by charter, who were the immediate grantees ; and afterwards gave them power to swear freemen upon their request, they first taking the oaths ; the freemen are not *ipso facto*, and without their assent, members of the corporation, though entitled to be admitted if they choose. Rex v. Amery, 1 T. R. 575. In the case of the College of Physicians, the charter was granted to six persons by name, and all others of the faculty of, and in the city of London. By virtue of this charter, it was held, that all the practising physicians in London were not members of the corporation ; and, that the corporation were only bound to admit every person, whom they, on examination, thought fit to be admitted. Rex v. Askew, 4 Burr. 2190.

charter is applied for, and it is given, there can be no reasonable ground to doubt of its immediate acceptance. It has indeed been held that grants beneficial to corporations may be presumed to have been accepted, and an express acceptance is not necessary.¹ If a charter is granted to persons who have not applied for it, the grant, is said to be *in fieri*, until there has been an acceptance expressed.² It may for a time remain optional with the persons intended to be incorporated, whether they will take the benefit of the act of incorporation; yet if they execute the powers and claim the privileges granted, the duties imposed on them by the act will then attach, from which they cannot discharge themselves.³ It is not indispensable to show a written instrument, or even a vote of acceptance; and there may be many instances in which an acceptance can be inferred.⁴ And it has been expressly held, that the stockholders of a bank are bound by every act which amounts to an acceptance on the part of the directors.⁵ But this rule is founded upon the consideration, that certain persons have been invested with sufficient power to bind the whole body by their acceptance; were it otherwise, the charter must then be accepted by a *majority* of the whole number of the company. There is an authority for this distinction in Pennsylvania, in a case where a minority of the persons, in whom a trust for a school fund was vested, procured a charter of incorporation under the act of 1791. It was held, that no rights could be acquired in opposition to the will of the majority.⁶

¹ Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) R. 344.

² Dartmouth College v. Woodward, 4 Wheat. 688.

³ Riddle v. Pro. of Locks, &c. on Merrimack River, 7 Mass. R. 187.

⁴ Bank of U. States v. Dandridge, 12 Wheat. 71. It is not essential to the taking effect of the charter, that it should appear upon the corporate records. Russel v. M'Clellan, 14 Pick. (Mass.) R. 53. But parol evidence is inadmissible to prove acceptance, where the records of a corporate existence can be shown. Coffin v. Collins, 17 Maine R. 440.

⁵ Lincoln and Ken. Bank v. Richardson, 1 Greenl. (Me.) R. 79.

⁶ Commonwealth v. Huston, 7 Serg. & Rawle, (Penn.) R. 460; and see Dartmouth College v. Woodward, 4 Wheat. R. 688. When a charter is given to a company, and certain persons are nominated to admit others, the charter needs only be accepted by the majority of nominees; for they alone consti-

A charter must be accepted as it is offered and without *condition* ; neither can there be a *partial* acceptance any more than there can be an acceptance by part of the persons intended to be incorporated.¹ A charter cannot be partially accepted, whether it be a charter of *creation*, or extension of privilege.²

The rule, "that the acceptance of a charter must be unconditional, holds equally as to a charter of creation, and as to a charter to a pre-existing corporation."³ But if a new charter be given to a corporation already created, there may be a partial acceptance of the second charter ; and the body corporate may act partly under the one and partly under the other. On a contest for the office of high steward of the university of Cambridge, it was held by the Court, that the Crown could not take away from the university any rights that had formerly subsisted in them under old charters or prescriptive usage ; that the validity of these *new* charters must depend on the *acceptance* of the university ; that when the crown gave the new statutes, the university of Cambridge was of ancient establishment, and had former charters of very old date, and there was no intention to alter or overturn their ancient constitution ; that the new statutes undoubtedly meant to leave the ancient constitution of the university in a great measure as it was, without repealing their established rights and privileges ; and that the university could not mean to accept them on any other terms ; that it was not intended by the new statutes, to alter the mode of election, unless the university chose so to do ; that it was the *concurrence* and *acceptance* of the university that gave force to the charter of the crown ; that they might accept the body of statutes *separately* and *distinctly*, and were not bound to accept all, or *leave* all ; and that in the present case it appeared there was in fact a *partial* acceptance.⁴

stitute the original corporation, and those who are afterward admitted, manifest their assent by becoming members. *Rex v. Amery*, 1 T. R. 575.

¹ Wilcock on Mun. Corpor. 30 ; *Rex v. Passmore*, 3 T. R. 240 ; *Rex v. Amery*, 1 T. R. 589 ; *Rex v. Cambridge*, 3 Burr. 1656.

² *Rex v. Westwood*, 2 Dow & Clark, 21 ; 4 Bligh, N. C. 213 ; 7 Bing. 1 ; 7 Dow & R. 267 ; 4 Barn. & C. 781.

³ Wilcock on Mun. Corpor. 30 ; *Rex v. Passmore*, 3 T. R. 240 ; *Rex v. Amery*, 1 T. R. 589 ; *Rex v. Cambridge*, 3 Burr. 1656.

⁴ *Rex v. Cambridge*, 3 Burr. 1656 - 1661.

It has been stated, that the charter can be accepted neither conditionally nor partially ; it is equally well established, that it cannot be accepted for a limited time. And if it has once been received, though but for an hour, or even a moment, it is conclusive and obligatory.¹

It has been also already intimated that where persons, composing an intended corporation, act under the charter, it amounts to an acceptance. It is usual, whenever a charter is pleaded, and no direct and express acceptance can be averred, to show such usage as could not have prevailed, unless it had been received, and from which the court may necessarily infer an acceptance.

¹ *Rex v. Bazey*, 4 M. & S. 255.

CHAPTER III.

HOW THE BODY CORPORATE IS COMPOSED ; AND OF ITS NAME,
PLACE, MODE OF ACTION, POWERS, &C.

§ 1. A CORPORATION is usually composed of natural persons merely in their natural capacity ;¹ but it may also be composed of persons in their political capacity of members of other corporations.² Thus by a charter of Edward VI., the mayor, citizens, and commonalty of London are appointed Governors of Christ's Hospital of Bridewell, and incorporated by the name of the Governors of the possessions, revenues, and goods of the Hospital of Edward VI., King of England, of Christ Bridewell.³ So the government of the country may be, and often is, one of the members of a private corporation ; as in the case of the Bank of the United States, the Planter's Bank of Georgia,⁴ and the Bank of the State of S. Carolina.⁵

And a man, who forms a component part of a corporation aggregate, may have, to some purposes, a distinct corporate capacity, as in England, a dean and chapter form one corporation aggregate, but in many cases, both dean and prebendaries have distinct rights as corporations *sole* ; each may have peculiar revenues appropriated to him and his successors in his political capacity ; and the prebendaries alone, without the dean, may also form one aggregate corporation distinct from that of dean and chapter.

¹ A corporation may consist of both men and women, provided, its institution is not repugnant to the condition and modesty of women. Ayliffe, Civil Law, 204.

² 1 Kyd, 32.

³ 10 Co. 31 b.

⁴ 9 Wheat. R. 907.

⁵ 3 M'Cord, (S. C.) R. 377.

⁶ Something similar to this obtained with respect to abbeys and priories

So also several distinct and independent corporations may form the component parts of one general corporate body. For instance, in Shrewsbury in England there are several distinct and independent companies of carpenters, bricklayers, &c., and these all united form one great corporation, under the name of the "Company of Carpenters, Bricklayers, &c. of Shrewsbury." There are some towns also in England in which there are several incorporated companies of trades, which have so far a connexion with the general corporation of the town, that no man can be a freeman of the town at large, and consequently a member of the general corporation, without being previously a freeman of some one of these companies; and of this description is the corporation of the City of London. The general corporate bodies of the English Universities are constituted nearly in the same manner; for every member of the general corporation must be a member of some one of the colleges or halls within the university.¹ There are technical difficulties in considering sev-

before the dissolution of the monasteries; of the former there was but one kind, every house being independent; but of the latter there were two kinds; first, those where the prior was chief governor, as fully as any abbot in his abbey, and was chosen by the convent; secondly, those where the priory was a cell, subordinate to some great abbey, and the prior was placed and displaced at the will of the abbot. But there was a considerable difference between some of these cells; for some were altogether subject to their respective abbeys, who sent them what officers and monks they pleased, and took their revenues into the common stock of the abbeys; but others consisted of a stated number of monks, who had a prior sent them from the abbey, and paid a pension yearly, as an acknowledgment of their subjection, but acted in other matters as an independent body, and had the rest of the revenues for their own use. Burns, Eccles. Law, tit. Monasteries, § 7; 1 Kyd, 33, 34.

¹ 1 Kyd, 36. There are also several corporate companies of Trades, without reference to any general corporation of the town in which they are, and indeed where there is no incorporation of the town at all. The Bank, the East India Company, the College of Physicians, and other scientific companies, have no reference to the general corporation of the city of London. Ibid. In Massachusetts, the North Parish in Harwich was incorporated into a town by the name of Brewster, and having continued to act as a parish, it was contended, that it ceased to exist in that capacity upon its

eral corporations as *co-partners*, or as having blended their powers and interests together, so that whatever should have been done by one, should be binding on the others; and yet if they are all composed of the same individuals using several corporate powers for the same end and purpose, with nothing but the form of a record to distinguish them, equity would seem to require, that they should not be allowed to sever to the prejudice of any persons with whom either might contract.¹

§ 2. Many aggregate corporations are composed of distinct parts, which are called integral parts, without any one of which the corporation would not be complete, although none of them are by themselves a corporation. Thus, where a corporation consists of a mayor, aldermen, and commonalty, the mayor, the aldermen, and the commonalty are three integral parts; but neither of them has any corporate capacity, distinct from the other two, and therefore, the mayor cannot, in his political character of mayor, take in succession anything as a sole corporation; nor the aldermen, as a select body, take anything to them and their successors as an aggregate corporation. In many aggregate corporations there is one particular person, who is called the head, and who forms one of the integral parts; such is the mayor of a city corporation; and the chancellor in the general corporations of the English universities.² The corporation of St. Mary's

incorporation into a town; but it was decided that the parish still continued to exist. It was also settled as law, that the inhabitants of a town are not necessarily, and of course, members of a parish included within it; but that those who are exempted on account of their religious scruples and opinions, though members of the town, are not members of the parish comprehended by the same boundaries. *Dillingham v. Snow*, 3 Mass. R. 276; 5 Mass. R. 547. And see *In. of Milford v. Godfrey*, 1 Pick. (Mass.) R. 98.

¹ Per Parker, C. J. in *Proprietors of Canal Bridge v. Gordon*, 1 Pick. (Mass.) R. 305.

² 1 Kyd, 36. But there may be a corporation aggregate of many persons, capable, without a head, as a chapter without a dean, or a commonalty without a mayor; thus the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries only, without a dean; and the Governors of Sutton's Hospital, commonly called the Charter House, have no president or

Church in the city of Philadelphia, consisting of three *clerical* and eight *lay* members, was considered by the court to be a corporation composed of two distinct classes, or integral parts.¹

§ 3. It is stated by Mr. Kyd² that there are *three* different kinds of assemblies in corporations, which he styles *legislative*, *electoral*, and *administrative*.

1. The *legislative* assembly possesses the power of making laws; such are the court of common council in London, the court of proprietors of the Bank of England, and of the East India and South Sea Companies.³ And in this division of corporate assemblies, it is obvious, may be included any part of the body corporate in which is vested the authority of prescribing rules of conduct for the body at large.

2. The *electoral* assembly is that which is authorized to elect officers; such are in general the proprietors of stock companies; and the body at large of every corporation, when the power of election has not been vested in a minor body.

3. The *administrative* have the management of *particular affairs*, such as the courts of assistants in the city companies of Europe; the court of directors of a bank and other stock companies.

The same body of men may therefore, and frequently do possess distinct powers; as for instance, the comitia majora of the college of physicians, in the city of London, who possess the legislative, the electoral, and the administrative powers; so all the three powers are possessed by the congregation in the university of Cambridge, in England. In private corporations generally the electoral power is in the body at large, though it may be

superior, but are all of equal authority; and at first the greater number of corporations were without a head. Ibid. 37.

¹ Corpor. of St. Mary's Church, 7 S. & Rawle, (Penn.) R. 517.

² 1 Kyd, 399.

³ So are the legislative courts of the different London companies of tradesmen; the comitia majora of the College of Physicians, the convocation in the university of Oxford, and the congregation or senate in the university of Cambridge. Ibid.

vested in a body selected solely to make elections, or in the legislative or administrative assembly. The qualification of persons to exercise the above powers must of course depend upon the charter and the by-laws.¹

§ 4. Every corporation should have a name² by which it is to sue and be sued, and do all legal acts. The name of incorporation, says Sir Edward Coke, is a proper name, or name of baptism; and therefore, when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the King baptizes the corporation.³ But though the name of a corporate body is compared to the Christian name of a natural person, yet the comparison is not in all respects perfectly correct. A Christian name consists, in general, but of a single word, as Oliver, or Robert, in which the alteration or omission of a single letter may make a material alteration in the name. Thus, if a man intending to sue Oliver, name him Olive, the writ must abate, because Olive is the name of a woman, and Oliver that of a man. But the name of a corporation, frequently consists of several words, and the transposition, interpolation, omission, or alteration of some of them may make no essential difference in their sense.⁴ So in a devise to a corporation, if the words of a devise are sufficient (though the name be entirely mistaken) to show, that the testator could only mean a particular corporation, it is sufficient, as for instance, a devise to John Bishop of Norwich, when his name is George.⁵ So, it was held in Massachusetts, that a devise to "The Inhabitants of the *South* Parish," may be enjoyed by "The Inhabitants of the *First* Parish."⁶

¹ Ibid. 400.

² Com. Dig. tit. Franchise, (F. 9.), 10 R. 29, b.

³ 10 R. 28.

⁴ See 1 Kyd, 227. In all legal proceedings, where a corporation is introduced, its true name must be used. *Ld. Raym.* 1515; *Rex v. Croke*, Cowp. 29; *Minot v. Curtis*, 7 Mass. R. 441.

⁵ *Hob. R.* 33.

⁶ *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) R. 232. See also *Dauphin Turnpike Co. v. Myers*, 6 S. & Rawle, (Penn.) R. 12.

And also where a name of a corporate grantor is mistaken, as where John Abbott of N. granted common of pasture to J. S. by the name of William Abbott of N. the grant is still good.¹

The name of a corporation, it seems, may be *implied*; as if the inhabitants of Dale should be incorporated with power to choose a mayor annually, though no name be expressed, yet it is a good corporation by the name of "Mayor and Commonalty."²

And a corporation may have one name, by which it may take and grant, and another, by which it may plead and be impleaded. Thus it may purchase and grant by the name of "Master, Wardens, and Brothers," and be empowered to plead and be impleaded by the name of "Wardens" alone.³ But in this respect a distinction has been made between the case of a corporation by *prescription*, and that of a corporation by *charter*; the former may have several names to the same purpose; and a *scire facias* will lie in one of the names on a judgment obtained in the other.⁴ But a corporation by charter, it is said, though it may, either by

¹ 6 R. 65, and Bac. Abr. tit. Corporations. And in all grants by or to corporations, if there is enough expressed to show that there is such an artificial being, and to distinguish it from all others, the body politic is well named, although there is a variation of words and syllables. 10 R. 135. So if the name be expressed by words which are synonymous, it is sufficient; as where a college was instituted by the name of *Guardianus et Scholares*, and they made a lease by the name of *Custos et Scholares*, it was adjudged good. Ib. And so, if J. S. Abbot, of B. makes a lease by the name of J. S. Clericus, of B. 11 R. 21. Where an obligation was made to a corporation, founded by the name of "*Mayor et Burgenses Burgi Dom Regis de Lynn Regis*," by the name of "*Mayor et Burgenses de Lynn Regis*," and without saying *Burgi Dom Regis*, it was held that the name of the corporation was sufficiently expressed. 10 R. 125. And where the "Dean and Chapter of the Cathedral Church in Oxford" made a lease by the name of "The Dean and Chapter of the Cathedral Church in the University of Oxford," it was adjudged good, as the place of situation was well and sufficiently shown. Poph. 57. Whether a particular corporation is intended by a description in a partition, is for the determination of the jury. *Society for propagating the Gospel v. Young*, 2 N. H. R. 310.

² 1 Salk. 191.

³ Bro. Corpor. 95; 1 Kyd, 229; Wilcock on Mun. Corpor. 34.

⁴ 1 Kyd, 229.

charter, or by act of Parliament, be empowered to grant and purchase by one name, and sue and be sued by another, yet cannot have two names to the same purpose.¹ Mr. Kyd says, "This may be true with respect to a grant by *charter*," but adds "There seems to be no reason why an *act of Parliament* might not empower a corporation by charter to use two names to the same purpose."² It has been held in Massachusetts, that a *parish* may be known by several corporate names; and the court say, "We know not why a corporation may not be known in its public proceedings by several names, as well as individuals."³

A corporation which has been dissolved, (or more correctly, suspended,) by the loss of the governing members, may be revived either by the old, or by a name different from that by which it was formerly known, still preserving its identity and ancient rights.⁴

For the purpose of preserving regularity in legal proceedings, a slighter variation of name may be sufficient to sustain a plea in abatement, than that which would be held necessary for the purpose of allowing a grant or other act to be avoided by the party, who would derive advantage from setting it aside, after having probably received a good consideration. And the court allows a variance to be taken advantage of in a plea of abatement, which it will not admit as sufficient ground for a non-suit.⁵

¹ 3 Salk. 102; Lutw. 108; Hard. 504.

² 1 Kyd, 230. A corporation by prescription may have more names than one. Wilcock on Mun. Corpor. 34.

³ *Minot v. Curtis*, 7 Mass. R. 441.

⁴ 1 Kyd, 232; Wilcock on Mun. Corpor. 36; Episcopal Charitable Society v. Episcopal Church, 1 Pick. (Mass.) R. 372.

⁵ Wilcock on Mun. Corpor. 37; and see also *Minot v. Curtis*, 7 Mass. R. 441. It was held, that using the name of Mayor and Burgesses of the "borough of S." where the charter incorporated the place by the name of the Mayor and Burgesses of the "borough of S. in the county S." to be called the Mayor and Burgesses of the "borough of S. in the county of S." might be taken advantage of on a plea in abatement; but that a corporation averring that it was incorporated by the former name would not be subject to a non-suit, though the latter appeared to be the true name, upon showing the charter; for this is an error in addition, and not in substance, and the

§ 5. A corporation, it is said, should be constituted of some *place*.¹ And though the place be not in reality in the country subject to the dominion of the government creating the corporation, the corporation should be mentioned as of that country ; as the "corporation of St. John of Jerusalem in England."² It is sufficient if the corporation is named of any place, though it may not have any lands or possessions there.³ Where justice requires it, the court will look into the residence of the individual members composing the corporation ; and if such members can sue in any court, by right of citizenship, the corporation may sue.⁴ Political and municipal corporations, as counties, towns, parishes, &c., are of course always local ; but private corporations are more ambulatory, and are not restricted as to the residence of their members, or the place at which their affairs are to be conducted.⁵

In the case of the *Hartford Fire Insurance Company*, the Supreme Court of Connecticut thought, that in a figurative sense, a corporation might be said to *inhabit* where the members of it reside ; but, except in the instances of land occupied by the servants of corporations, they were not able to find *residence* ascribed to them ; and they held that the case before them was the case of a corporation which had no local limits. The corporation had an office in Hartford for the transaction of business, but owned no land there ; and under these circumstances, the court were at a loss to conceive "by what analogy, or figure of speech, in the

defendant cannot say there was no such corporation. *Lyme Regis*, 10 R. 126 ; *Stafford v. Bolton*, 1 B. & P. 41 ; *Ipswich v. Johnson*, 2 Barnard, 120 ; 1 Kyd, 258.

¹ 1 R. 123.

² 10 R. 32, b.

³ Com. Dig. tit. Fran. (F. 8.)

⁴ *Lexington Manufacturing Co. v. Dorr*, 2 Litt. (Ky.) R. 256. Bank stock belonging to a corporation having no local limits, but required by its charter to keep its office in the town of H., is not taxable in the town of H., within the meaning of the statute of Connecticut, providing for the collection of taxes. *Hartford Fire Ins. Co. v. Hartford*, 3 Conn. R. 15.

⁵ *M'Call v. Byram Man. Co.* 6 Conn. R. 428.

absence of all usage, an invisible, incorporeal entity may be said to reside in a place, on the slight ground contended for."¹

By the Supreme Court of the United States it has been adjudged, that though a corporation can have no legal existence out of the sovereignty by which it is created, and must in this country dwell in the State of its creation, having its existence in that State only, yet its existence is recognised in other places, and it may, in those other places, enter into contracts.²

But a college, founded and established by the regents of a university in a particular place, has not the power to establish a school, as a branch of such college, in a place different from that in which the college is located ; and it was accordingly held, that the establishment by Geneva College, located in Ontario county, in the State of New York, of a medical school in the city of New York, and the appointment of professors to take charge of the same, was the usurpation of a franchise.³

Where two corporations are created by adjacent States, with the same name, to construct a canal in each of the States respectively, and afterwards their interests are united, by subsequent acts of the States respectively, this does not merge the separate corporate existence of such corporation. In such case a unity of stock and interest only is created.⁴

§ 6. We have seen, that in constituting a body corporate a legal or artificial person is substituted for a natural person ; and where a number of natural persons are concerned, there is given to them the property of individuality. The common law of every state or country annexes to this local or artificial person, when created, certain incidents and attributes ; and, both by the laws of England and the United States, there are several powers

¹ *Hartford Fire Ins. Co. v. Town of Hartford*, 3 Conn. R. 15.

² *Runyan v. Coster*, 14 Peters, R. 122. And see post, Ch. vii., "Of the Mode in which a Corporation may contract," &c. ; and *Bank of Augusta v. Earle*, 13 Peters R. 519.

³ *People v. Trustees of Geneva College*, 5 Wend. (N. Y.) R. 211.

⁴ *Farnum v. Blackstone Canal Co.* 1 Sum. (Cir. Co.) R. 47.

and capacities which tacitly, and without any express provision, are considered inseparable from every corporation.

Mr. Kyd enumerates five of these as necessarily and inseparably incident to *every* corporation. 1. To have perpetual succession, and hence all *aggregate* corporations have a power necessarily implied of electing members in the room of such as are removed by death or otherwise. 2. To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as *natural* persons may. 3. To purchase lands and hold them for the benefit of themselves and their successors. 4. To have a common seal; and 5. To make by-laws, which are considered as private statutes for the government of the corporate body.¹ To these ordinary incidents of an incorporated company, Kent, in his commentaries, has added, as a sixth, — the power of amotion or removal of members; and in the power to purchase and hold property, he includes chattels, as well as land.² And he adds, that “some of these powers are to be taken in many instances, with much modification and restriction; and the essence of a corporation consists only of a capacity to have perpetual succession, under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities.”³ Mr. Kyd likewise remarks, “that to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities. 1. To

¹ 1 Kyd, 69.

² 2 Kent, Comm. 224.

³ Ibid. According to Lord Holt, neither the actual possession of property, nor the actual enjoyment of franchises, are of the essence of a corporation. *The King v. City of London, Skinner*, 310. To have a common seal, and to make by-laws, it is admitted, are very unnecessary to a corporation sole, though they may be practised by it; and that the last is not so inseparably incident to a corporation *aggregate*, that it cannot subsist without it; for there are some corporations *aggregate*, to which rules may be prescribed, and which they are bound to obey. See Kyd, 69, and 1 Black. Comm. 475, 476.

have perpetual succession under a *special* denomination, and under an artificial form. 2. To take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual. 3. To receive grants of privileges and immunities, and to enjoy them in *common*.¹

All the before mentioned incidental powers and capacities of course may be, and frequently are restrained and limited by the act or charter of incorporation. And when they are not in any degree restricted or curtailed, they can only be exercised to effect the purposes for which they were conferred by the government. The general practice is, in the United States, to specify the powers with which it is intended to endow the society or company incorporated; and these powers will be found to be given in reference to the object in view in creating the corporation. If the object of the corporation is to *insure property*, for instance, it cannot exercise the power of acting as a *banking* institution. We shall have occasion to go at large into the subject of the power of corporations to engage in any particular trade or business foreign to its institution, under the head of their power to make contracts; and therefore, it is here only necessary to lay down what is the general and well settled principle, that a corporation has no other powers than such as are specifically granted; or, such as are necessary for the purpose of carrying into effect the powers expressly granted. In other words, the general powers of a corporate body must be restricted by the nature and object of its institution. As was said by the Supreme Court of the United States, — “the exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.”² The case of the *Utica Insurance Company*, in New York, affords an illustration of what, as we shall by and by show, is the well settled and general rule in this country, viz. that a corporation is confined to the sphere of action limited by the terms and intention of the charter. In that case it was held, that the

¹ 1 Kyd, 70.

² *Beatty v. Lessee of Knowler*, 4 Peters, R. 152.

company (not being authorized by charter to become proprietors of any *bank*, or fund for the purpose of issuing notes, receiving deposits, &c., which incorporated banks are allowed to do) was not authorized, under the restraining act, to discount notes and loan money ; and that notes discounted, and securities for money loaned, were void.¹

Every act of incorporation must be construed in such a manner, if possible, as not to exceed the sovereignty of the legislature granting it. It ought not therefore, to be deemed to authorize any act to be done, which would exceed the jurisdictional power of the state, or interfere with the rights of other states ; as for instance to construct a canal, or raise a dam in another state.²

§ 7. The mode, by which corporations manifest their assent, make contracts, &c., is by their *common seal*, or, as it is sometimes expressed, *by deed* ; or by a *vote of the Company* ; or by the contracts and agreements of their authorized *agents*. But though such are the usual modes in which corporations act ; and though, as a general rule, the doings and declarations of individual members, not sanctioned by the body, are not binding upon it, yet the rules of law have by modern decisions been made so flexible, as to allow inferences to be drawn from corporate acts, which tend to prove a contract or promise, as in cases of natural

¹ *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) R. 1. The lending of money by the company was not, however, declared void ; it was held, that the money might be recovered, though the security was void. See also *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 358 ; *Korn v. Mutual Ins. Society*, 6 Cranch, 192 ; *N. York Fire Ins. Co. v. Ely*, 5 Conn. R. 560 ; *Gozzler v. Corporation of Georgetown*, 6 Wheat. R. 593 ; *Bank of Utica v. Smedes*, 6 Cowen, (N. Y.) R. 684 ; *M'Mullen v. City Council*, 1 Bays, (S. C.) R. 46 ; *American Jurist*, No. VIII, p. 306 ; *Mayor &c. v. M'Kee*, 2 Yerg. (Tenn.) R. 167 ; *Webb v. Manchester &c.*, 4 Mylne & Craig, (Eng. Ch. R.) 116 ; *Pearce v. N. Orleans Building Co.* 9 Louisiana, R. 395 ; *Ib.* 461 ; *Beatty v. Knowler*, 4 Peters, R. 152 ; *Stewart v. Stebbins*, 1 Stewart, (Ala.) R. 299 ; *State v. Mayor &c. of Mobile*, 5 Port (Ala.) R. 279 ; *Betts v. Menard*, 1 Bre. (Ill.) R. 10.

² *Farnum v. Blackstone Canal Co.*, 1 Sum. (Cir. Co.) R. 47.

persons.¹ And there are corporate powers, which, though not expressly designated, may fairly be implied ; for such powers are much beyond the control of subsequent legislation as powers expressly granted.²

The powers, capacities, and capabilities peculiar to a corporation, and the modes in which it may act, will constitute a very large portion of our treatise ; and we shall next proceed to consider these subjects in the following order :—

I. *Of the Admission and Election of Members and Officers.*

II. *Of the Power to take, hold, transmit in succession, and alienate Property.*

III. *Of the Common Seal.*

IV. *Of the modes in which a Corporation may contract, and what Contracts it may make.*

V. *Of Agents of Corporations, their modes of appointment and power.*

VI. *Of the By-Laws.*

VII. *Of the Power and Liability to sue and be sued.*

VIII. *Of the Disfranchisement and Amotion of Members and Officers.*

¹ See Post, Chapters relative to common Seal, Contracts, and Agents.

² *People v. Manhattan Co.*, 9 Wend. (N. Y.) R. 351 ; *Mayor &c. of Baltimore*, 1 Gill & Johns. (Md.) R. 480.

CHAPTER IV.

OF THE ADMISSION AND ELECTION OF MEMBERS AND OFFICERS.

§ 1. IN relation to the power of admitting members, reference must often be had to the provisions and spirit of the charter ; and when the charter is silent, we must look to the rules of the common law, and to the particular nature and purpose of the corporation. In certain corporations (such, for example, as religious and literary) the number of members is often limited by charter ; and whenever there is a vacancy, it is usually filled by a *vote* of the company. The number of members, who must *concur* in voting both for the admission of members and election of officers, is a subject we have reserved for a subsequent chapter, in which we shall treat of the concurrence necessary to do all corporate acts. As regards trading, and joint stock corporations, no vote of admission is requisite ; for any person who owns stock therein, either by original subscription, or by conveyance, is in general entitled to, and cannot be refused, the rights and privileges of a member.¹ “ All that can be required,” say the Supreme Court of Massachusetts, “ of the person demanding a transfer on the books, would be to prove to the corporation his right to the *property*.” In that case, one of the joint assignees produced the assignment with the original certificate of the former owners, and claimed for himself and his partner to be the purchasers for a valuable consideration. This was deemed a sufficient notice of the assignment and request to have the transfer made upon the books of the corporation.² In a mutual insurance company, it

¹ *Gray v. Portland Bank*, 3 Mass. R. 364 ; *The King v. Bank of England*, Doug. 524. A mandamus will be granted to a canal company to enter upon their books the probate of a will of a deceased shareholder. *The King v. Worcester Canal Company*, 1 Man. & Ry. 529.

² *Sargent v. Franklin Ins. Co.* 8 Pick. (Mass.) R. 90.

has been held, that a person may become a member by insuring his property, paying the premium and deposit money, and rendering himself liable to be assessed according to the rules of the corporation.¹ In the important case of *Overseers of the Poor v. Sears*, SHAW C. J. in delivering the opinion of the Court, says ; "In all bridge, railroad, and turnpike companies, in all banks, insurance companies, manufacturing companies, and generally in corporations having a capital stock, and looking to profits, membership is constituted by a transfer of shares, according to the by-laws, without any election on the part of the corporation itself."² The rights acquired by an individual in commercial corporations, by a purchase and conveyance of stock, will receive more particular attention in the subsequent chapter relating to the transfer of stock.

§ 2. The power of electing both officers and members being incident, as has been before observed, to every corporation ; it is not necessary that such power should be expressly conferred by the charter. And if the power is not expressly lodged in other hands, (as for instance in a body of directors,) it must be exercised by the company at large. On this account, if an election is relied upon by any select body in pleading, it need not be shown by what authority and in what form such body is constituted ; for a general allegation of election implies an election by the whole body in the exercise of their incidental power. This power of election both of members and officers may, by the charter or by a general statute, be taken from the body at large, and reposed in a body of directors, or any other select body.³ So the corporation at large may, if not inconsistent with the charter, make a by-law creating a select body, to whom they may delegate the power of electing officers and members.⁴ Thus

¹ *Sullivan v. Massachusetts Mutual Fire Ins. Co.*, 2 Mass. R. 315.

² 22 Pick. (Mass.) R. 122. And see *Philadelphia Savings Institutions* (case of) 1 Whart. (Penn.) R. 461 ; *Long Island Rail Road Co.* (in the matter of) 19 Wend. (N. Y.) R. 37.

³ 1 Rol. Abr. 513, l. 50 ; *Philips v. Bury*, Parl. Ca. 45 ; *Wilcock on Mun. Corpor.* 201.

⁴ *Ex parte Wilcocks*, 7 Cowen, (N. Y.) R. 402 ; *Anon.* 12 Mod. 225. It has

it was held in the case of *The Commonwealth v. Woelper*, that the corporation might by a by-law give to the *President* the power of appointing inspectors of the corporate elections; and might also define by by-laws the nature of the tickets to be used, and the manner of voting.¹ And it was decided in *Newling v. Francis*, that when the mode of electing corporate officers was not regulated by charter or prescription, the corporation might make by-laws to regulate the election, provided they did not infringe the charter.² But this power must be exercised with caution, and with no sinister design.³

§ 3. The power of election reposed in a select body may be only of certain officers; and one class of officers may be made eligible by one select body, and another class by a different. And if it is declared by the charter by whom some officers may

been said that when the right of election was originally vested in the corporation at large, it could not be transferred to a select body by a new charter; but denied by Holt, C. J. *Rex v. Larwood*, Skin. 573; *Rex v. Wymre*, 2 Barnard, 391. There is certainly no good reason for maintaining, that it cannot be so altered, unless we maintain that the franchise of being a corporation cannot be surrendered; but if we support the latter position, we can hardly admit so fundamental an alteration in the constitution. This alteration is not to be contended for on the same ground that a by-law, altering the manner of election, may be supported; that is, common assent; for in the acceptance of the charter, the grantees assent not only for themselves, but their successors also, forever; whereas, in making a by-law, the assent binds (or is presumed to bind) only themselves and their successors, *until* the majority choose to change their will, and repeal the ordinance. The cases which have been determined on the presumption, that the right of election may be restricted by a new charter, are so numerous, that the question seems to be no longer controvertible. Wilcock on Mun. Corpor. 202.

¹ *Commonwealth v. Woelper*, 3 S. & Rawle, (Penn.) R. 29.

² *Newling v. Francis*, 3 T. R. 189. The power of election must be exercised under the modifications of the charter or statute, of which the corporation is the mere creature, and which usually prescribes the time and manner of corporate elections, and defines the qualifications of the electors. If this be not done, it is in the power of the corporation itself by its by-laws to regulate the manner of election. 2 Kent, Comm. 237. See the chapter on By-Laws.

³ *St. Luke's Church v. Mathews*, 4 Desauss. (S. C.) Chan. R. 485.

be elected, and no provision is made for the election of others, the others must be chosen, of course, by the body at large, by virtue of their incidental authority.¹

§ 4. If no particular form is prescribed for the election of officers, and the election has been conducted in good faith, it will not be set aside.² And where the legality of an election is disputed, evidence may be given of transactions previous to the election.³ But no usage adduced in explanation can sustain a corporate act, done in a manner plainly contrary to that prescribed by the charter. And yet if the meaning of the words of the charter is doubtful, usage for a great length of time might be considered as explanatory of the intention of the government.⁴

An election of directors will not be set aside on a summary application to the proper court, on the ground, that the inspectors were not sworn in the form prescribed by the statute. It is enough that they were duly appointed, and entered and commenced the discharge of their duties. They were inspectors *de facto*.⁵

Where votes, rejected by inspectors at an election of directors, if received would have elected a certain ticket, are adjudged to have been erroneously reported, the only remedy is to set aside the election; the court have not the power to declare the ticket successful, for which the votes would have been cast, had they been received.⁶

¹ *Rex v. Maidstone*, 3 Burr. 1837; 4 Burr. 2209; *Rex v. Head*, 4 Burr. 2521; *Hoblyn v. Regem*, 6 Bro. Parl. C. 519; *Newling v. Francis*, 3 T. R. 189; *Rex v. Bird*, 13 East, 385; *Rex v. Westwood*, 4 B. & C. 800.

² *Rex v. Thetford*, 8 East, 271; *Rex v. Sparrow*, 2 Str. 1123.

³ *Philips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 590.

⁴ *Commonwealth v. Woelper, &c.* 3 S. & Rawle, (Penn.) R. 29.

⁵ In the matter of the Mohawk and Hudson Rail Road Co., 19 Wend. (N. Y.) R. 135. And see *Chenang Co. Ins. Co.* Ib. 635.

⁶ *Long Island Rail Road Co.* (in the matter of,) 19 Wend. (N. Y.) R. 37. To impeach the election of the party returned as elected, it is not sufficient to allege that many votes were bad and fictitious, without showing that

§ 5. It is said that one cannot be elected to a corporate office in reversion ;¹ and therefore it is essential to a valid election, that there be a vacancy of the office at the time of the election. Indeed if it had been customary to elect a person, who shall succeed into the first vacancy, the corporation may, on the occurring of the vacancy, elect another, and set aside the officer elect.² So if A be illegally amoved, and B elected in his stead, and A afterwards is restored in obedience to the writ of mandamus, the election of B is void ; for the restoration puts in A as of his ancient title, and has relation back to the moment of his amotion, from which he continues to have been a legal officer, as though he had never been amoved. And the validity of B's election depending entirely upon the legality of A's removal, B is entitled to fill another vacancy, if one should not happen in the same body, after the restoration of A ; but he is returned to the same situation as though A had never been amoved, and he never elected.³

§ 6. A particular day is generally appointed by the constitution of a corporation for the election of the principal officers. This is usually styled the "charter day," and is usually fixed with so much certainty that no doubt can arise. Where the trustees of a religious corporation were required by statute, to be divided into three classes, and the seats of one class were to be vacated at the expiration of every year, so that one third should be "annually chosen," and the time of the annual election was required to be, at least, six days before the vacancies should happen ; it was adjudged, that an election on *Pinxter Monday*

some other candidate had a majority of legal votes. *Rex v. Jefferson*, 1 Nev. & M. 773.

¹ *Rex v. Miller*, 2 T. R. 280 ; *Rex v. Varlo*, Cowp. R. 250.

² *Wilcock on Mun. Corpor.* 207 ; 2 Kyd, 5.

³ *Ibid.* ; *Colt v. Bishop of Coventry*, Hob. R. 150 ; *Owen v. Staines*, Skin. 45 ; *Shuttleworth v. Lincoln*, 2 Bulstr. 122. So, if under the supposition, that the place of A, an alderman, is vacant, while that of B, who is also an alderman, is really vacant, C be elected into the supposed vacant office of A, his election is void, and cannot be referred to the actual vacancy of B's office. *Rex v. Smith*, 2 M. & S. 407.

(i. e. the Monday after *Whitsunday*,) in each year, though a movable holyday, and not a day certain, was valid. The Court observed, that the church having fixed upon a yearly religious epoch, it would be revolting to hold the corporation dissolved, from the very first time that the elections were so held, and that all its subsequent elections and acts were void, merely because the holyday, selected for the election, did not correspond with the solar year; and that they must give the statute a liberal and reasonable construction, for the benefit of the churches; and that there were many decisions in the books, showing that the election in such cases is valid, if made after the year, and especially if an integral part of the corporation remains.¹

It has been held, that the words, "between the hours of ten in the morning, and two in the afternoon," are not imperative, but merely directory, and an election may be well begun at any other reasonable time of the day.² The charters of private incorporated companies in this country are, in general, sufficiently free to allow an election of the necessary officers to be made when the occasion requires it.

It is not necessary that the person elected be present at the assembly, if he is within such a distance, that he can in due time enter upon the duties and exercise of his office.³

§ 7. If there is no form prescribed for the election, every candidate must be proposed singly, whether the election is by the whole body or by a definite class; and if the names of more than one be set down in a list, and the election proposed to be made of the whole by a single vote, such election is altogether void, although the names have been repeatedly read over, and an offer made to strike out any to which an objection should be made, and notwithstanding the election was by the unanimous consent

¹ *People v. Runkle*, 9 Johns. (N. Y.) R. 147. And see *Hicks v. Town of Launceston*, 1 Roll. Abr. 512; *Foot v. Mayor of Truro*, Str. 625.

² *Rex v. Poole*, 7 Mod. R. 195. If the elective assembly be held on the charter day, it may be adjourned to a reasonable hour of the following day, though not between the hours of ten and twelve. *Ibid.*

³ *Rex v. Courtenay*, 9 East, 261.

of the entire body. For, it may be presumed that, instead of using his judgment as to the propriety of admitting any individual, (which would be the case where they are separately proposed,) each elector, desirous to obtain the admission of some one in particular, may compromise his opinion as to the others, and thus persons may be introduced who would otherwise have been rejected.¹ Where a majority protest against the election of a proposed candidate, and do not propose any *other* candidate, the *minority* may elect the candidate proposed.²

After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes; the only manner in which they can effectually prevent his election is by voting for some other qualified person.³

§ 8. The right of voting at an election of an incorporated company *by proxy* is not a general right, and the party who claims it must show a special authority for that purpose. The only case in which it is allowable, at the common law, is by the peers of England, and that is said to be in virtue of a special permission of the King.⁴ Chancellor Walworth of New York

¹ *Rex v. Monday*, Cowp. R. 539; *Wilcock on Mun. Corp.* 215.

² 2 Kyd, 12; *Oldknow v. Wainwright*, 2 Burr. 1017.

³ *Ibid*; *Rex v. Foxcroft*, 2 Burr. 1020; *Crawford v. Powell*, 2 Burr. 1016; S. C. 1 W. Black. 229. If the assembly be duly convened, and the majority vote for an unqualified person, after notice that he is not qualified, their votes are thrown away, and the person having the next majority, and not appearing to be disqualified, is duly elected. *Claridge v. Evelyn*, 5 B. & A. 86; *Rex v. Parry, &c.* 14 East, 561.

⁴ *Phillips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 500.

thought it possible, that the right of voting by proxy might be delegated in some cases by the by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting. He was not aware of any case other than the one before him, where the right was ever claimed; and the express power, which is generally given to the stockholders of moneyed and other private corporations, opposed to the claim, where there is no express or implied power contained in the act.¹

In the case of the *State v. Tudor* in Connecticut,² there was no clause in the act of incorporation empowering the members of the company to vote by proxy; but a by-law passed by the company provided, that the shareholders might so vote. It was urged on the one side, that it was incident to every corporation, the object of which is the acquisition of property, that votes might be given by proxy; and at any rate, after the by-law before mentioned, there could be no doubt as to such right. On the other side, it was said, that no such common law right existed; that it was a fundamental principle in corporations of every kind, that votes should be given in person and not by proxy; that this being the common law, was the law of Connecticut; and that no by-law authorizing votes to be given by proxy could be valid, the same being contrary to the laws of Connecticut. The opinion of the Court was, the vote given by the attorney for his principal ought to have been received; and though the Court deemed it unnecessary to say how the point would have been determined, had no by-law been made, yet they expressed the opinion, that incorporated societies, whose object is the acquisition of property, stood on a different ground, as to this question, from those of every other kind. That is to say, it is not so clear, that every vote given in a corporation of the former kind must be personal, as it is that it must be so in one of the latter. Ingersoll, who gave the opinion of the Court, went on to observe; "I agree most fully, that by the common law, every vote given in a corporation instituted for the public good, either the good of the whole state, or of a particular town or society, must be per-

¹ 1 Paige, (N. Y.) Chan. R. 590.

² *State v. Tudor*, 5 Day, (Conn.) R. 329.

sonally given. So also, every vote given by a freeman for his representative must be given by him in person. There is no deviation from this rule ; the authorities on this subject are uniform. Neither can a vote be given in a town or society meeting, merely on the ground of owning property within the limits of such town or society. But from the very nature of a moneyed institution, the mere owning of shares in the stock of the corporation seems, of course, to give a right of voting. But whatever right might have been the result of reasoning on the nature of moneyed institutions, still, since the passing of the by-law above mentioned, I am very clear that the votes for the officers of this corporation, as well as all other votes relative to it, may be given by proxy."

In *Taylor v. Griswold*,¹ in the Supreme Court of New Jersey, after a full and learned discussion, it was held to be a principle of the common law, that where an election depended upon the exercise of judgment, the right could not be disputed ; and that it required legislative sanction before any corporate body could make a by-law authorizing members to vote by proxy. The authority of the case of the *State v. Tudor* may therefore, says Kent in his commentaries, be considered as essentially shaken.²

An alien stockholder, it has been determined, cannot vote by proxy, where, by the terms of incorporation, the right so to vote is given to each stockholder being a citizen.³

§ 9. A mere tenant for years, or one who has taken the property on shares, and has no *substantial* interest therein, cannot exercise the right of voting for officers, without the concurrence of the real owner.⁴ In the case of *Ex parte Holmes*, in the Supreme Court of New York,⁵ a rule was moved for to establish the election of L. R. and 24 others, who, as was claimed, had been chosen directors of the Tradesmen's Insurance Company, in

¹ *Taylor v. Griswold*, 2 Green, (N. J.) R. 223.

² 2 Kent, Comm. 4th ed. 294, (note.)

³ *Ex parte Barker* rel. to Merchts. Ins. Co. 6 Wend. (N. Y.) R. 509.

⁴ *Phillips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 590.

⁵ *Ex parte Holmes*, 5 Cowen, (N. Y.) R. 426.

the city of New York. The act to facilitate proceedings against incorporated companies, upon which this motion was made, provides, "that in all cases where the right of voting upon any share or shares of the stock of any incorporated company shall be questioned, it shall be the duty of the inspectors of the elections to require the transfer books of said company, as evidence of stock held in the said company; and all such shares as may appear standing thereon, in the name of any person or persons, shall be voted on by such person or persons directly by themselves, or by proxy, subject to the provision of the act of incorporation." There was nothing in the act of incorporation which interfered to prevent the application of this provision. The Court said, that the provision was broad enough *literally* to include all stockholders, whether in their own right, or as mere trustees for others; and then proceeded to observe; "But the question remains, whether the latter are to be deemed stockholders, within the spirit of the act. True, the stock on which they voted, in this case, stands in their name; but on the face of the entry they are declared to be mere nominal holders. The real owner of the stock should vote, especially where his name is truly expressed in the books; though it might be otherwise, if he choose to have the entry simply in the name of another, without expressing any trust. Now these three persons, a majority of whom claim a right to vote, are mere trustees; and they are trustees not for the directors, but the company, the corporation itself. If there could be a vote at all upon such stock, one would suppose that it must be by each stockholder of the company, in proportion to his interest in it.

"This brings us to the important difficulty in the case; which is, whether stock thus held can vote at all. And we think it is not to be considered as stock held by any one for the purpose of being voted upon. No doubt the company may, from necessity, as in this case, take their own stock in pledge or payment; and keep it outstanding in trustees, to prevent its merger; and convert it to their security. But it is not stock to be voted upon, within the meaning of the charter, or the general act upon which we are proceeding. It is not to be tolerated, that a

company should procure stock, in any shape, which its officers may wield to the purposes of an election ; thus securing themselves against the possibility of removal.

In the case of *Ex parte Willcocks*, in the State of New York,¹ the Court say ; “ We do not hesitate to say that, in a clear case of hypothecation, the pledger may vote. The possession may well continue with him, consistently with the nature of the contract ; and the stock remains in his name. Till enforced and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation have nothing to do.”² In a case in the Supreme Court of Massachusetts, it was held, that if a stockholder of a bank transfers his shares by a writing absolute in form, and surrenders his certificate of stock, and leaves with the cashier an agreement, in which, (after reciting that he had transferred the shares, as collateral security for the payment of a note to the bank,) he covenants that if the note shall not be duly paid, the bank may sell the shares, and apply the proceeds to the payment of the note, and hold the surplus to his use ; that he was still entitled to the rights of membership. The stockholder in this case paid interest from time to time upon the note after it had fallen due ; but he continued to receive the dividends upon the shares.³

There is a case in which one of the reasons assigned on a motion for a new trial was, that *aliens* were not entitled to vote for vestrymen and church wardens, in the corporation called “ The Ministers, Vestrymen, and Church Wardens of the German Lutheran Congregation in and near the City of Philadelphia.” The decision, however, was that aliens otherwise qualified are entitled to vote. Yeates J. made a distinction between *political* and *private* corporations as to this right of aliens ; and was unable to

¹ *Ex parte Willcocks*, 7 Cowen, (N. Y.) R. 402.

² The case of *Ex parte Willcocks* (*supra*) was relied on as governing this case, but there the shares stood in the names of the persons who were trustees for the corporation. And it was not intended, by the decision in that case, to open an inquiry into every case of hypothecation.

³ *Merchants' Bank v. Cook*, 4 Pick. (Mass.) R. 405.

perceive any sound objection against aliens being included in grants with natural born subjects, merely for religious purposes. He observed ; “ Foreigners come to our shores ignorant of our laws and customs, with all their different prepossessions for a particular system of polity. Should they think it expedient, they may distract, perplex, and thwart the public measures of the country. The sovereign power would naturally guard against such events, and prevent these new comers from participating in all the rights of natural born subjects, until they become seasoned to the soil, and familiarized with the new government and its legal institutions. The same dangers are not to be apprehended from foreigners desirous of being incorporated with others, merely for the exercise of religious duties.” Tilghman C. J., who considered the point somewhat elaborately, remarked ; “ The point turns on the charter ; there the qualification is fixed ; and there is no mention of citizen or subject, either in the charter itself, or in the fundamental articles to which it refers. I do not conceive that we have any right to insert it.”¹

§ 10. If the right of election be reposed by charter in a select class, consisting of a definite number, (twelve for example,) and the company have undertaken to increase the number, the elections of all persons, chosen after the number of twelve is complete, are a mere nullity ; and if such persons give their vote as members of that class, they may be rejected as illegal.² But the mere circumstance, that improper votes are received at an election, will not vitiate it. The fact should be affirmatively shown, that a sufficient number of improper votes were received for the successful ticket, to reduce it to a minority, if they had been rejected ; or otherwise the election must stand. In *Ex parte Murphy* and others, at an annual election of the corporation of St. Peter's Church in the city of New York, holden for the choice of *four* trustees, *eight* persons were voted for, *four* of whom

¹ *Commonwealth v. Woelper*, 3 S. & Rawle, (Penn.) R. 29 ; and see *Stewart v. Foster*, 2 Binney, (Penn.) R. 120.

² *Rex v. Hearle*, Str. 625 ; S. C. 3 Bro. Parl. C. 178 ; Cowp. 567.

had 102 votes, and *four*, 100. The voting was by ballot. The inspectors having certified that the four having 102 votes were duly elected, a motion was made for leave to file an information, in nature of a *quo warranto*, against them, as unduly elected. One ground of the motion was, that two ballots were put into the box in the names of two persons who were formerly voters, but who had died some weeks before the day of election. This fact was not discovered until after the inspectors had given their certificate ; nor did it at the trial appear for whom the two improper votes were given. The court held, that " the motion must be denied. For aught that appears, the spurious ballots were for the ticket which was in the minority. To warrant setting aside the election, it must appear affirmatively, that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority. The mere circumstance, that improper votes are received, will not vitiate an election. If this were otherwise, hardly an election in the state could be sustained."¹

§ 11. If the charter declare, that in default of certain acts the election shall be void, no formality is requisite to annul it, but the place is as vacant as though no election had ever taken place, and is not merely voidable. Another, therefore, may be elected into the office without the necessity of resorting to an information in *quo warranto*, to oust the officer elect.² But if the charter do not so declare, an irregular election, as in case of the election of an unqualified person, is voidable only, and not actually void.³ And hence, the acts of trustees of a religious corporation irregularly elected, yet in *colore officii*, will be valid, until such trustees are ousted by judgment at the suit of the people.⁴ In the case of the *Bank of the United States v. Dandridge*, Mr. Justice Story, in giving the opinion of the Court, observes ; " Persons acting publicly as officers of the corporation are

¹ *Ex parte Murphy and others*, 7 Cowen, 153.

² *Rex v. Sanchar*, 2 Show. 67.

³ *Rex v. Bridge*, 1 M. & S. 76 ; *Crawford v. Powell*, 2 Burr. 1016.

⁴ *Trustees of Vernon Society v. Hills*, 6 Cowen, (N. Y.) R. 23.

to be presumed rightfully in office." And again; "If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank, and is recognised by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts as cashier will *bind the corporation*, although no written proof is, or can be adduced of his appointment."¹ And it has also been expressly held in the State of Pennsylvania, that one who is elected to an office in a corporation, by the body in which the power to elect is vested, but by a less number of that body than the charter authorizes, is an officer *de facto*, and his acts, at least as they respect third persons, are binding on the corporation.² In this case the company (bank) was governed by thirteen directors, five of whom were a quorum for the business of ordinary discounts, but a majority of the whole number was required for all business. At a meeting when five only were present, the directors elected G. B. to fill a vacancy in the board; and at another meeting when eight were present, including G. B., agreed by a vote of six to one, (one having retired before the vote was taken,) to accept the real estate of a debtor in satisfaction of a debt due to the bank, — G. B. voting in favor of the acceptance. It was held, that G. B. having come into the direction under color of right, was an officer *de facto*, and consequently that the contract was binding on the bank.

§ 12. In the case of *Ex parte Willcocks*,³ it was inquired by the counsel, whether it would be considered lawful for the *inspectors* of a corporate election to be candidates for the direction of the Utica Insurance Company. The answer given by the Court was in the affirmative. The majority of the judges of the Su-

¹ *Bank of U. States v. Dandridge*, 12 Wheat. R. 79.

² *Baird v. Bank of Washington*, 11 S. & Rawle, (Penn.) R. 411. See chapter on Agents, & see *Fairfield Turnp. Co. v. Thorp*, 13 Conn. R. 173.

³ *Ex parte Willcocks*, 7 Cowen, (N. Y.) R. 402.

preme Court of Pennsylvania were of the same opinion, in the case of *Commonwealth v. Woelper, &c.*¹ In this case it was objected, that one of the inspectors could not be voted for, because he was a *judge* of the election. He was viewed, however, by all the judges, except Gibson, as a *ministerial* officer ; and the Chief Justice (Tilgham) understood it to have been a very common thing, in corporate elections, and in state elections, to vote for inspectors. Yeates J. also held, that the acceptance of the office of judge of an election could not impair the freedom of choice in the corporators ; and the practice of returning an inspector, he thought, was strikingly exemplified by what occurred at the election of common council men for the City of Philadelphia, in 1816. But Gibson J. was unable to concur with the rest of the court ; and he considered the judge of an election as a judicial and not as a ministerial officer. If one who is the judge of an election, he thought, is at the same time a candidate, he has a direct interest in the event, and cannot be viewed in any other light than as judging in his own cause. The ground taken by Mr. J. Gibson is, at least, extremely plausible ; the weight of authority is, however, against him.

Where an act of incorporation provides, that a president shall be chosen "out of three directors," it is sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors ; without having been *previously* appointed a *director*. It was considered in this case, that the president was appointed a director *eodem flatu*, that he was made president ; and that there could be no real utility in requiring an unnecessary circuitry of proceeding.²

§ 13. It was said by Chancellor Walworth, that he was not aware of any general principle of the common law, which authorizes all civil, or corporate officers, to hold over after the expiration of the time for which they were elected, until their places are supplied by others ; and that the numerous statutes both here and in England, giving such authority in express terms, seemed whol-

¹ *Commonwealth v. Woelper, &c.* 3 S. & Rawle, (Penn. R.) 29.

² *Currie's Adm's v. Mutual Assurance Society*, 4 Hen. & Munf. (Va.) R. 315.

ly inconsistent with any such common law principle. But the case before him did not require the expression of a decisive opinion on the point.¹ In the case of *The People v. Runkin*, however, it was conceded by the Supreme Court of New York, that the trustees of a religious society, who go out of office at the end of the year, hold over until others are appointed. The question there was, whether an election after the day of election was good. The Court said, "perhaps the language of the statute is too peremptory, that the seats of one third are to be vacated at the expiration of every year; but the corporation is not thereby dissolved; for two thirds of the trustees continue in office." The Court in this case also said, that trustees elected after the election day would be in by color of office; that the election would not be void; that their acts would be good; that the corporation would still remain; and the irregularity, if any, *would cure itself in a subsequent year*.² There is also a strong intimation in another case in the Supreme Court of New York, that corporate officers may hold over until others are elected in their stead.³ In the more recent case of *Philips v. Wickham*, however, to which we have referred, Chancellor Walworth says; "Were it not for the strong intimations to the contrary by some of the justices

¹ *Philips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 595. In the case of the Corporation of Tregony, (8 Mod. R. 127,) the mayor was to be elected annually, but there was an express provision in the charter, that he should hold over until another was duly elected. But in the Banbury case, (10 Mod. R. 340,) where there could be no election without the presence of the old mayor, who was not authorized by the charter to hold over, and the day prescribed was permitted to pass without an election, the corporation was held to be dissolved. There are undoubtedly some common law officers, who are to be elected or appointed periodically, but who, from the necessity of the case, continue to exercise their functions until others are elected or appointed to fill their places. In the Anonymous case, (12 Mod. R. 256,) it is said, a constable is not discharged until his successor is appointed and sworn in; because the parish cannot be without an officer. But all these cases the Chancellor of New York, in the case above cited, apprehended were dependent upon the peculiar provisions of their respective charters, and not upon any general principles of the common law.

² *People v. Runkin*, 9 Johns. (N. Y.) R. 147.

³ *Trustees of Vernon Society v. Hills*, 6 Cowen, (N. Y.) R. 23.

of the Supreme Court, in *The People v. Runkin*, and *The Trustees of Vernon Society v. Hills*, under the act respecting religious incorporations, the language of which appears to be equally clear, I should have supposed that the functions of these commissioners ceased at the end of the year for which they were elected.”

A clause, in a charter which directed that the aldermen should be chosen annually, was held to be only directory, and not to determine the office at the end of the year after election ; but that the person legally elected and sworn into the office should continue until his death or removal, in the same manner as a person elected into the office of mayor.¹

In Kentucky, in case of a failure to elect officers on the day appointed, the old officers retain their powers, and may act until superseded by a new appointment.²

Kent thinks the better opinion to be, that though the officers of a corporation be required by the charter to be annually elected, yet if the time of election under the charter slips, the old corporate officers continue in office after the year, and until others are elected.³

§ 14. Baron Comyn says, “ If a corporation refuses to continue the election of officers till all die who could make an election, the corporation is dissolved.”⁴ But where the corporators, without the presence of any officers, or any act to be done on their part, possess the power to assemble and choose officers, to

¹ *Prowese v. Foot* (in Error), 2 Brown, Parl. Cases, 289; *S. P. Pender v. Rex* (in Error), *Ibid.* 294.

² *Weir v. Bush*, 4 Lit. (Ken.) R. 433.

³ 2 Kent, Comm. 238. The statute 11 Geo. I. c. 4, was made expressly to prevent the hazard of a dissolution of the corporation from the omission to elect on the day. This statute is considered, however, to be *declaratory*, and was introduced to remove doubts and difficulty. *Ibid.*

⁴ 4 Com. Dig. 273, tit. Franchise, c. 4. If a corporation consists of several integral parts, and some of those are gone, and the remaining parts have no power to supply the deficiency, the corporation is dissolved. 1 Roll. Abr. 514.

carry into effect the objects of the incorporation, a neglect to choose officers at the proper time will not work a dissolution; but will merely suspend the exercise of the powers of the corporation until proper officers are chosen. Thus, it was held in New York, that the owners of drowned lands under the act of 1807, who were a quasi corporation, and through inadvertence made no election of commissioners, did not lose, by their neglect, the power of election, though the time and place for the annual meeting of the owners were fixed by law. The Court observed; "There is nothing in the nature of the duties to be performed, which necessarily requires a continued succession of commissioners. The officers of towns are required to be chosen by the people annually, at their several town meetings; yet if a part of those officers should die before the expiration of the year, and the inhabitants of the town should, from any cause, neglect to hold their annual town meeting, it would not prevent them from supplying the vacancy at their next anniversary meeting for that purpose. The officers thus chosen would possess all the powers of their predecessors, in the same manner as if there had been an uninterrupted succession."¹

In *Slee v. Bloom*,² Chancellor Kent held, that corporate power, which may have been abused or abandoned, cannot be taken away but by *regular process*.³ And per Savage, C. J.; "The plaintiffs have acted as trustees upon the matter, and in bringing their suit, *colore officii*, and before an objection to their right can be sustained by the defendant, on the ground that they were not regularly elected, he must show, that proceedings have been instituted against them by the government, and carried on to a judgment of ouster."

¹ Per Chan. Walworth, *Philips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 597. And see, *Rose v. Turnpike Co.* 3 Watts, (Penn.) R. 46; *Weir v. Bush*, 4 Litt. (Ky.) R. 433; *Blake v. Hinkle*, 10 Yerg (Tenn.) R. 218; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle (Penn.) R. 9; *Smith v. Natchez Steamboat Co.*, 2 How. (Miss.) R. 478; *Spencer v. Campion*, 9 Conn. R. 536.

² *Slee v. Bloom*, 5 Johns. (N. Y.) Ch. R. 379.

³ See *Trustees of Vernon Society v. Hills*, 6 Cowen, (N. Y.) R. 23; and see also *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 373.

CHAPTER V.

OF THE POWER TO TAKE, HOLD, TRANSMIT IN SUCCESSION,
AND ALIENATE, PROPERTY.

§ 1. To enable it to answer the purposes of its creation, every corporation aggregate has incidentally, at common law, a right to take, hold, and transmit in succession, property, real and personal, to an unlimited extent or amount.¹ Accordingly as the incident supposes the principal, it has been held, that a grant of lands from the sovereign authority to the inhabitants of a county, town, or hundred rendering rent, would create them a corporation for that single intent, or confer upon them a capacity to take and hold the lands in a corporate character, without saying, to them and their successors.² And where it was evident from the different clauses of several local acts of parliament, that conservators of a river navigation were to take and transmit lands by succession, although they were not created a corporation by express words, they were considered from the possession of this incident to be incorporated by implication; so that they were entitled to sue in their corporate name for an injury done to their real estate, and in that character received their tolls.³ After the

¹ Litt. R. 49, 112, 114; Co. Litt. 44 a, 300 b; 1 Sid. 161 w; 10 Co. 30 b; 1 Kyd on Corp. 76, 78, 104; Comm. Dig. tit. Franchise F. 11, 15, 16, 17; Dy. 48 a; 4 Co. 65 a; 1 Black, Comm. 478; 2 Kent, Comm. 227; M'Cartee v. Orph. As. Co., 9 Cowen, R. 437; The Banks v. Poitiaux, 3 Rand. (Virg.) R. 141; Widow &c. Reynolds v. Commissioners of Stark County, 5 Ohio, R. 205; Lathrop v. Com. Bank of Scioto, 8 Dana, (Ken.) R. 119; Binney's case, 2 Bland, (Md.) R. 142; Overseers of Poor of Boston v. Sears 22 Pick. (Mass.) R. 122.

² Dyer, 100 a, pl. 70, cited as good law by Lord Kenyon, 2 Term. R. 672; 2 Kent, Comm. 225; North Hempstead v. Hempstead, 2 Wendell, (N. Y.) R. 109; Stebbins v. Jennings, 10 Pick. (Mass.) R. 188; Soc. for Prop. Gospel v. Town of Pawlet, 4 Peters R. 480.

³ Tone Conservators v. Ash, 10 B. & C. 349; Bridgewater Canal Co. v. Bluett, Ibid. 393.

issuing of letters patent by the Governor, in compliance with the requisition of an act of the General Assembly creating a corporation, a deed to convey land to the company is good and effectual in Pennsylvania for that purpose, although they may not have been so far organized as to have elected their officers ; and their assent to it will be presumed.¹

The principal benefit of incorporation is, that by it the combined funds of a body of men may, through a long course of time, be steadily applied to the attainment of objects of public convenience or private utility, notwithstanding the changes, which, through the accidents of life, must be constantly going on among the members of the corporation.² As a matter of general law, the amount so to be held and applied must necessarily be indefinite ; since no rule could be laid down ascertaining the means essential to effect the various purposes of incorporated companies. This amount therefore, and under the name of capital stock in case of moneyed corporations, is usually fixed by the legislature, in the act or charter of incorporation, with special reference to the purposes of the particular grant. As sound policy always requires that the capital stock should be restricted within reasonable limits, so it is easy to see that, to enable the company to answer the purpose of its incorporation, it may also require that the capital stock should amount to such a sum, as would make it efficient for that purpose. And hence it is not uncommon for the charter or act of incorporation to provide, that the capital stock or a certain amount of it shall be subscribed, or paid in, before the company shall be at liberty to act under their charter.³ Where, however, a bank is incorporated, with the privilege of creating a stock not less than one sum nor greater than another, it may commence business with the smaller capital, and afterwards increase it to the larger.⁴ And though a bank charter provides that the capital stock "*may consist*" of a certain amount, divided into shares of a certain amount each, and "*shall be paid*" in the following manner, &c., one dollar on each share in sixty, and one

¹ Rathbone v. Tioga Navigation Co., 2 Watts & Serg. (Penn.) R. 74.

² Dartmouth College v. Woodward, 4 Wheat. R. 518.

³ Bend v. Susquehannah Bridge, &c., 6 Har. & J. (Md.) R. 128.

⁴ Gray v. Portland Bank, 3 Mass. R. 364.

in ninety days after subscription, "*the remainder to be called for as the President and Directors may deem proper, &c.*," and there was no clause expressly restricting the operation of the bank, until a certain amount of the stock was subscribed, the word "*may*" was construed in its ordinary sense, and not by the common rule as synonymous with the word "*must*;" so that it was decided, that a *bonâ fide* subscription of the capital stock, prescribed by the charter, was not a condition precedent to the corporate existence or legal operation of the bank.¹ Even if the charter does contain a clause restrictive of the operation of a bank, until a certain amount of its stock was subscribed, it would be difficult to maintain that a collusive subscription, got up between the original subscribers and the commissioners, for the purpose of evading such a clause, could be permitted to be set up to the injury of the subsequent purchasers of the stock, who became *bonâ fide* holders, without participation in or notice of the fraud.² Indeed, if the subscription was fraudulent, although the subscribers would not be permitted to avail themselves of the same, yet their subscription would not be a nullity; but the law would hold the parties bound to their subscription, and compellable to comply with all the terms and responsibilities imposed upon them thereby, in the same manner as if they were *bona fide* subscribers.³ If by charter or act of incorporation the stock of the company is divided into a certain number of shares, that number cannot be changed by the company.⁴ Nor, if the charter requires that a certain number of shares be subscribed for, before an assessment be laid, can an assessment be laid, until that number is subscribed for.⁵ In such case a subscription by one man for another without authority, for the purpose of completing the requisite number of shares, will avail nothing in favor of the assessment,⁶ and if any

¹ Minor et al v. The Mechanics Bank of Alexandria, 1 Peters, R. 46.

² Per Story J. Ibid. See Walker v. Devereaux, 4 Paige, (N. Y.) Chan. R. 229.

³ Ibid.; and Walker v. Devereaux, 4 Page, (N. Y.) Chan. R. 229.

⁴ Salem Mill Dam Corporation v. Ropes, 6 Pick. (Mass.) R. 23.

⁵ Ibid., & Central Turnp. Corp. v. Valentine, 10 Pick. (Mass.) R. 142.

⁶ Salem Mill Dam Corporation v. Ropes, 9 Pick. (Mass.) R. 187.

subscription were conditional, it must be shown that the condition was satisfied or waived.

In England, the common law right of corporations, whether sole or aggregate, ecclesiastical or lay, to take and hold lands and tenements, has been restrained by a variety of statutes, from Magna Charta, 9 Hen. III., ch. 36, to 9 Geo. II., ch. 36, called statutes of *mortmain*, which were passed in conformity to a policy prevailing in that country, from a period somewhat anterior to the Norman conquest.¹ This system of laws appears to have originated in a desire to repress the grasping spirit of the Romish Church, which, by absorbing in perpetuity the best lands in the kingdom, prevented their transmission from man to man, withdrew them from those feudal services that were ordained for common defence, and curtailed the lords of the fruits of their signiories, their escheats, wardships, reliefs, and the like.² They were called statutes of mortmain, according to the better opinion, because designed to prevent the holding of lands by the *dead clutch* of ecclesiastical corporations, which in early times were composed of members dead in law, and in whose possession property was forever dead, and unproductive to the feudal superior and the public.³ Though the statute of 15 R. 11, ch. 5, extended this system of restraint to civil or lay corporations, as within the mischief and prohibition, the name still remained ; and in England, lands purchased by corporations are liable to forfeiture, unless a license in mortmain from the King, as ultimate lord of every fee, be first obtained. According to Blackstone, even this is not in all cases sufficient.⁴ The statutes of mortmain make no mention of personal property ; and hence in England, the power of corporations aggregate to take such property remains in general unlimited, unless restrained by the charters or acts of parliament establishing them.⁵

The English statutes of mortmain have been held by the Supreme Court of Pennsylvania to be the law of that State, so far

¹ Co. Lit. 2 b ; 1 Black. Comm. 479 ; 2 Black, Comm. 268 to 274.

² Co. Lit. 2 b ; 2 Black. Comm. 269, 270 ; 2 Kent, Comm. 228.

³ Co. Lit. 2 b ; 1 Black. Comm. 479.

⁴ Sup.

⁵ 1 Kyd on Corp. 104.

as applicable to its political condition ; and “ all conveyances by deed or will of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly.”¹ They are, however, understood to apply in that State, only so far as they prohibit dedications of property to superstitious uses, or grants to corporations without a statutory license.² “ In other States,” says Kent, “ it is understood, that the statutes of mortmain have not been re-enacted or practised upon.”³ It may still, however, be inferred from the special power given to various corporations, by acts of the state legislatures, to hold real estate to a certain limited extent, that statute corporations, created for specific objects, would not have the power to take and hold real estate, for purposes wholly foreign to those objects.⁴

The Civil Law in this particular corresponded with the system established by the statutes of mortmain, since, according to it, a corporation could not purchase or receive donations of lands without license. *Collegium si nullo speciali privilegio subnixum sit hæreditatem capere non posse, dubium non sit.*⁵ Though it be true, therefore, that the English statutes of mortmain owed their origin to the principles of the feudal system, it is evident that their policy was known and acted upon, long anterior to the existence of that system as recognised by the common law.

As a corporation may be deprived or restrained of its common law right of purchasing or receiving lands or other property, by general statutes applicable to all corporations, so the same right may be taken away or limited by its charter or act of incorporation ; — a law peculiar to itself.⁶ To prevent monopolies, and

¹ 3 Binney, R. App. p. 626.

² Methodist Church v. Remington, 1 Watts, (Penn.) R. 218.

³ 2 Kent, Comm. 229 ; M'Cartee v. Orph. As. Soc. 9 Cowen, (N. Y.) R. 452 ; Lathrop v. Com. Bank of Scioto, 8 Dana, (Ken.) R. 119.

⁴ Ibid ; First Parish in Sutton v. Cole, 3 Pick. (Mass.) R. 239, 240 ; Per Parker, Ch. J.

⁵ Browne's Civil Law, 103 ; Lib. 8, Code de hæred. instituen. ; Salem Mill Dam Corporation v. Ropes, 6 Pick. (Mass.) R. 23.

⁶ 2 Kent, Comm. 228 ; 1 Kyd on Corp. 104.

to confine the action of incorporated companies strictly within their proper sphere, the acts incorporating them almost invariably limit not only the amount of property they shall hold — or their capital stock — but frequently prescribe in what it shall consist, the purposes for which it shall alone be purchased and held, and the mode in which it shall be applied to effect those purposes. There can be no doubt, that if a corporation be forbidden by its charter to *purchase* or *take* lands, a deed made to it would be void, as its capacity must be determined from the instrument which gives it existence.¹ There is, however, a broad distinction between a prohibition to *purchase* or *take*, and a prohibition to *hold*; and where the act incorporating a bank made it capable “to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, tenements, goods, chattels, and effects of whatever kind, nature, or quality, to the amount of two millions of dollars, and no more; Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to *purchase and hold*, shall only extend to such lot and lots of ground, and convenient buildings and improvements thereon erected, or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose;” it was decided by the Supreme Court of Pennsylvania, that the bank might *purchase*, absolutely, lands in a distant country which they did not occupy, though they, or the third person to whom they might convey, would *hold* them by a title defeasible by the Commonwealth, and the Commonwealth alone, as is the case with the title of aliens.²

To a bill by certain banks for the specific performance of a contract for the purchase of lands made by an individual with them, the defence set up was, that the charters of the banks, after authorizing them to purchase, hold, and enjoy lands and tenements, goods and chattels, to a specified value, and sell and dispose of them, provided, that the lands it should be lawful for them to *hold* should be only such as were for their immediate accommodation,

¹ *Leazure v. Hillegas*, 7 Serg. & R. (Penn.) R. 319, Per Tilghman, C. J.

² *Ibid*; *Baird v. The Bank of Washington*, 11 Serg. & R. (Penn.) R. 418.

&c., or acquired in satisfaction of debts, &c. — that the lands in question did not fall within either of these descriptions, and that therefore the banks could not acquire or convey any title to a purchaser of them. The Court of Appeals of Virginia decided, that though if, in purchasing the land in question, the banks violated their charters, they might for that cause be dissolved by a proceeding at the suit of the Commonwealth, yet that any conveyance made before dissolution would pass an indefeasible title to the purchaser ; — that the charters did not prohibit the *purchase* of real property by the banks, but only limited the extent to which they should be allowed to *hold* such property ; — and that the question, whether they had exceeded their limits or not, was not fit to be tried in the suit before them, or at the instance of the party before them.¹

Where, by its act of incorporation, a bank was empowered to hold “ such lands as were *bona fide* mortgaged, or conveyed to it, in satisfaction of debts *previously contracted in the course of its dealings*,” the Supreme Court of Pennsylvania adjudged, that it had a general power to commute debts *really* due for real estate ; and that this power did not depend upon, whether, in the opinion of the jury, the debt was in danger, and prudence required that the real estate should be taken in satisfaction of it.² It was considered by the Court in this case, that a conveyance in trust to permit a corporation, which could not accept of the legal title, to receive the rents and profits, or a conveyance that in any shape would entitle the corporation to be put in possession, would be as much a violation of the law, as a direct conveyance of the legal title ; but that a conveyance made with a view not to permanent ownership by the corporation, but of raising money by the sale of the property, would be neither within the letter nor the spirit of the prohibition implied above.³ An academy incorporated “ to promote morality, piety, and religion, and for the

¹ *The Banks v. Poitiaux*, 3 Rand, (Virg.) R. 136. See *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370.

² *Baird v. The Bank of Washington*, 11 Serg. & Rawle, (Penn.) 411.

³ *Ibid.*

instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies," and authorized to hold and apply property within a certain limit to these purposes, was considered authorized to raise and hold a fund for the education of pious indigent young men, with a sole view to the Christian ministry.¹

As corporations unless restrained by their charters have an indefinite right of purchase, where the restraint is imposed by a *proviso*, as, "provided the lands be necessary for manufacturing purposes," it is incumbent on the party objecting to the purchase, to bring the case, by proof, within the proviso.²

A corporation may take a mortgage upon land by way of security for loans, made in the regular course of its lawful business, or in satisfaction of debts, previously contracted in its dealings. Such acts are generally provided for in charters incorporating a certain class of corporations, such as banks, insurance companies, and the like; and without such special authority, it would seem to be implied in the reason and spirit of the grant, if the debt was *bona fide* created in the regular course of business.³ The capital stock of an insurance company may be invested in bonds and mortgages, executed directly to the corporation, or obtained by assignment, where the charter does not expressly prescribe the mode of investment, even though it impliedly gives the power to invest in stocks.⁴ Nor are securities taken by such a company affected by the fact, that they are taken at a different place from that at which, by necessary intendment, its proper business should be transacted; provided there be no proof that the business, in which the securities were taken, was unauthorized, though it be shown that the company has an office for the transaction of busi-

¹ *Amherst Academy v. Cowles*, 6 Pick. (Mass.) R. 427.

² *Ex parte Peru Iron Co.* 7 Cowen, (N. Y.) R. 540.

³ *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370; *Baird v. Bank of Washington*, 11 Serg. & R. (Penn.) 411; *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 358; *Utica Ins. Co. v. Scott*, 8 Cowen, (N. Y.) R. 709; *Leazure v. Hillegas*, 7 S. & R. (Penn.) R. 319; *The Bank v. Poitiaux*, 3 Rand. (Virg.) R. 136; *Mann v. Eckford's Ex'ors.*, 15 Wend. (N. Y.) R. 502; 2 Kent, Comm. 282, 3d edit.

⁴ *Mann v. Eckford's Ex'ors.* 15 Wend. (N. Y.) R. 502.

ness at the place where the securities were taken.¹ And where by its charter a bank was authorized to take mortgages in security for debts previously contracted ; ” it was adjudged by Chancellor Kent, that if the loan and mortgage were *concurrent* acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. “ A mortgage taken to secure a loan, advanced *bona fide* as a loan, in the course, and according to the usage of banking operations, was not, surely, says he, within the prohibition.”² This decision in New York was upon the construction of a clause in the charter of a Pennsylvania Bank ; and in the subsequent case of *Baird v. the Bank of Washington*,³ the Supreme Court of Pennsylvania viewed, with the same liberality of construction, a similar clause in the charter of another bank in that State. The clause seems to have been introduced to prevent the bank from indirectly getting real estate into its hands, ostensibly in payment of a debt, but in truth and fact, by a transaction which, in its origin, was a purchase. “ The intention was,” says Gibson J., “ to restrict the right to cases where the loan should be real and not merely colorable ; but I cannot think it was intended to narrow it further, or it would have been so expressed.”⁴ An act incorporating an insurance and loan company provided, “ that in all cases where the said corporation have become the purchasers of any real estate, on which they have made loans, the mortgagors shall have the right of redemption of any such property in payment of the principal, interest, and costs, so long as it remains in the hands of the corporation unsold ; ” and by virtue of it, a mortgagor’s right of redemption was adjudged to continue, notwithstanding a contract for the sale of the mortgaged premises had been entered into and duly executed by the company, one third of the purchase money paid, and possession taken by making surveys, &c. ; the right of

¹ *Ibid.*

² *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370.

³ 11 Serg. & Rawle, (Penn.) R. 411.

⁴ *Ibid.* 417.

redemption, under such a clause, being extinguished only by the execution and delivery of a deed of conveyance to the purchaser, who must be deemed to have contracted with the notice of the rights of mortgagor.¹ In such a case a purchase by an agent of the company does not bar the right of redemption, it being a purchase by the company within the meaning of the act.² A corporation, authorized to invest its capital *only* on bond and mortgage, cannot recover money lent by the corporation, except a bond and mortgage be taken as security for its repayment; every other security, as well as the contract itself, being void.³

We have seen that an insurance company, impliedly authorized to invest in *stocks*, may nevertheless without express authority invest its capital stock in bonds and mortgages.⁴ Where such a company was by charter restricted from dealing "*in the purchase or sale of any stock or funded debt whatever, created or to be created, by or under any act of the United States, or of any particular State,*" the restriction was construed not to apply to investments in the stock of the *Bank* of the United States, or in the stock of the *banks*, or *money corporations* of any particular State.⁵

An insurance company, restricted by charter from discounting notes, though authorized to take and hold securities *bona fide* pledged to them to secure debts due to them cannot lead money on the hypothecation of stock, and the taking of a note as collateral security for the payment of the loan.⁶ A banking association adopted certain articles as the basis of their union, by which it was agreed, that the subscribers to the bank should be permitted to pay one tenth of their subscriptions in the stocks of certain incorporated companies, and the remainder in money. The

¹ *Edwards v. Farmers Fire Ins. Co.*, 21 Wend. (N. Y.) R. 467.

² *Ibid.*

³ *Life and Fire Ins. Co. v. Mechanics Fire Ins. Co.*, 7 Wend. (N. Y.) R. 31. See also *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) R. 482; *N. Y. Fire Ins. Co. v. Ely*, 2 Cowen, (N. Y.) R. 678.

⁴ *Mann v. Eckford's Ex'ors*, 15 Wend. (N. Y.) R. 502.

⁵ *Verplanck v. The Mercantile Ins. Co.*, 1 Edw. (N. Y.) Ch. R. 84.

⁶ *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) R. 482.

articles of association authorized the immediate commencement of business, and provided for and contemplated an application to Congress for a charter, which was, some time after they had carried on business as an association, obtained, and provided *that the whole capital stock of the bank should be paid in money*. Upon a bill by one of the subscribers to have an account of the profits of the stock by him subscribed and payment for the same, it was decided, that the stock subscribed and paid in had become consolidated with the other part of the capital of the association, having been received as so much money, that neither the subscribers nor their assignees were entitled to have a specific return or an account of the same, and that the charter of incorporation produced no change in this respect.¹ A corporation owning its own stock cannot authorize its directors, or even the trustees of of the stock held by them for its own use, to vote upon it ; it not being permitted to a company to procure stock, which its officers may wield to the purposes of an election.²

§ 2. A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law and by force of law ; and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it may live and have its being in that state only, yet it does not follow that its existence there will not be recognised in other places ; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show, that the law of its creation gave it authority to make such contracts as those it seeks to enforce. Yet, as in case of a natural person it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the state of its creation is

¹ *Holbrook v. Union Bank of Alexandria*, 7 Wheat. R. 553.

² *Ex parte Holmes*, 5 Cowen, (N. Y.) R. 426 ; *Ex parte Desdoity*, 1 Wend. (N. Y.) R. 98.

acknowledged and recognised by the state or nation where the dealing takes place, and that it is permitted by the laws of that place to exercise the powers with which it is endowed.¹ Every power, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract, without the sanction, express or implied, of such sovereignty ; unless a case should be presented, in which a right claimed by the corporation should appear to be secured by the Constitution of the United States.² Accordingly, where a coal company incorporated by the State of New York, for the purpose of supplying the City of New York and its vicinity with coal, purchased coal lands in Pennsylvania, the recitals in the act of incorporation, which gave the power to purchase and hold lands, showing that this power was granted with special reference to the purchase of lands in the State of Pennsylvania, it was held by the Supreme Court of the United States, that the right to hold the lands so purchased depended upon the assent, express or implied, of the State of Pennsylvania ; and the Supreme Court of Pennsylvania having decided, that a corporation of that State, or of any other State has without special license a right to purchase, hold, and convey land, until some act is done by the government according to its own laws, to vest the estate in itself, it was decided that the lands purchased should remain in the corporation purchasing them, until divested by a proceeding instituted by the Commonwealth of Pennsylvania for that purpose, as forfeited to its own use.³ Indeed in those States where there are no general statutes or settled policy, restricting them in this respect, corporations of other states may purchase and hold lands *ad libitum*, provided their charters give them the competent power.⁴ The burthen is, however, upon the corpora-

¹ The Commercial and Railroad Bank of Vicksburgh *v.* Slocomb et al, 14 Peters, R. 60; S. P. Irvine, for the use of the Lumberman's Bank of Warren *v.* Lowry, 14 Peters, R. 393. And see Bank of Augusta *v.* Earle, 13 Peters, R. 584.

² Ibid.

³ Ibid.

⁴ Silver Lake Bank *v.* North, 4 Johns. Ch. (N.Y.) R. 370; Lombard *v.* Aldrich,

tion, or those claiming under it, to show, that by its charter it is a body politic authorized to take or convey lands.¹ It is obvious that the real estate of a corporation can be dealt with, only by the judicial authority of the State in which it lies; this holds, even though the corporation is created by the concurrent acts of several governments.² Nor is the applicability of this general principle affected by the fact, that the charter directs that the real property of the corporation shall be considered as personal estate; such a clause is merely a declaration, that by the municipal regulations of the State where it lies, such property shall be treated as personal and not as real estate; but by no means varies the international rule, that real estate, as part of the habitation of the nation, is to be governed by local law.³ Where two corporations are created by adjacent states with the same name, for the purpose of constructing a canal extending through a portion of both States, the interests of which are united by subsequent acts of the States, as the legislature of neither State can authorize an act — such as the raising of a dam, in the other, each act of incorporation must be construed as limited in its operation to the territorial limits of the State granting it.⁴

The capacity of corporations created by the British crown in this country or Great Britain, to hold their lands or other property in this country, was not affected by the revolution; the dismemberment of empire not involving with it the destruction of civil rights.⁵ The property of such corporations in this country is also protected from forfeiture for the cause of alienage, by the sixth article of the treaty of peace of 1783, in the same manner as the property of natural persons; and the title thus protected

8 New Hamp. R. 34; *Lathrop v. Commercial Bank of Scioto*, 8 Dana, (Ken.) R. 119; *Bank of Washtenaw v. Montgomery*, 2 Scammon, (Ill.) R. 428; 2 Kent, Comm. 284, 285.

¹ *Lumbard v. Aldrich*, 8 New Hamp. R. 34.

² *Binney's case*, 2 Bland, (Md.) Ch. R. 142.

³ *Binney's case*, 2 Bland, (Md.) Ch. R. 142.

⁴ *Farnum v. Blackstone Canal Corp.*, 1 Sumner, C. C. R. 46.

⁵ *Terrett v. Taylor*, 9 Cranch, R. 43; *Dartmouth College v. Woodward*,

4 Wheat. R. 518; *Society, &c. v. New Haven*, 8 Wheat. R. 464. See *Dawson's Lessee v. Godfrey*, 4 Cranch, R. 323.

is confirmed by the ninth article of the treaty of 1794.¹ It should be further observed that these treaties, so far as they stipulate for such permanent rights of property and general arrangements, profess to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war between Great Britain and this country, but are, at most, only suspended while it lasts ; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.²

§ 3. It is laid down by several eminent writers, that a corporation cannot be seized of lands to the use of another, and that it is incapable of any use or trust.³ It is certain, however, that many corporations are made trustees for charitable purposes, and are compelled to perform their trusts ; which may, says Mr. Kyd, be reconciled to the rule, in this way ; the trust is not vested in the corporation ; but the natural persons of whom it is composed are created trustees, and their description, as constituent parts of a corporation, operates only as a more certain designation of their persons ; this explanation appears more reasonable from what is said of a sole corporation on the same subject ; “ that a man who is a corporation sole cannot be seized to use in his corporate capacity, nor by his corporate name alone, without his *natural* name, and then the addition of his corporate name must be considered only as a fuller description of his person.”⁴ However plausible this may have appeared, it is very clear that *corporations*, and not the members of whom they are composed, are made trustees for charitable purposes, and are compelled to execute their trusts.⁵ One reason given for the incapacity of corporations

¹ *Society, &c. v. New Haven*, 8 Wheat. R. 464. See *Orr v. Hodgson*, 4 Wheat. R. 453.

² *Ibid.*

³ Bro. Abr. Uses, pl. 10 ; Bacon on Uses, 57 ; Gilbert on Uses, by Sugden, 7 n ; 1 Kyd on Corp. 72 ; Plowd. 102 ; 1 Cru. Dig. Tit. 11, Use, Ch. 2, § 15.

⁴ 1 Kyd on Corpor. 72, 73 ; 2 Leon, 122.

⁵ *Green v. Rutherford*, 1 Ves. 468, 470, 475 ; *Attorney Gen. v. Lauder-*

to be trustees is, that they cannot be compellable by subpoena to execute the possession to the use, because if they disobeyed they could not be enforced by imprisonment.¹ This reasoning proceeds upon the very erroneous supposition, that the only mode by which a Court of Chancery can enforce the execution of its process is by imprisonment, whereas by far the most effectual means of compulsion employed by equity may be used against corporations, as, distringas,² sequestration,³ injunction,⁴ or in case of misapplication of the trust fund, by directing it to be conveyed to suitable trustees.⁵ It has been said also, that the persons who compose a corporation might in their *natural* capacities have been seized to the use of another; and that it would be nugatory to allow them to do that in their *corporate* capacity, which they had power to do in their *natural*, as the sole purpose of incorporating them was to confer powers upon them, which they could not otherwise have.⁶ Without adverting to the many rights which corporations enjoy in common with individuals, exclusive of their *privileges*, these bodies, on account of their peculiar structure and perpetual succession, seem, in the language of Kent, "to be proper and safe depositories of trusts."⁷ Accordingly, "among the almost infinite variety of purposes for which corporations are created at the present day, we find them," says he, "authorized to receive and take by deed or devise, in their corporate capacity, any property real and personal in trust, and to assume and execute any trust so created."⁸ They "are also created with trust

field, 9 Mod. 287; Attorney General v. Utica Ins. Co., 2 Johns. (N. Y.) Ch. R. 384, 389; 2 Kent, Comm. 226; Attorney General v. Skinners Co. 5 Madd. R. 173; S. C. 1 Jac. 629.

¹ Gilb. Uses and Trusts, 5, 170; Jenk 195; Pl. Comm. 102, 538; 1 Kyd on Corp. 72.

² Newl. Harr. 149, 150; 2 Maddocks, Chan. 209, 210.

³ Ibid; Mayor of Coventry v. Attorney General, 2 Bro. P. C. 235.

⁴ Ibid.

⁵ Mayor of Coventry v. Attorney General, 2 Bro. P. C. 235; 2 Madd. Chan. 77.

⁶ 1 Kyd on Corp. 72; Gilb. Uses and Trusts, 5, 170.

⁷ 2 Kent, Comm. 226.

⁸ Ibid. See Farmer's Fire Ins. and Loan Company, Laws of N. York, 17th April, 1822, ch. 240.

powers of another kind; as for the purpose of loaning money on a deposit of goods and chattels by way of pledge or security.¹

Indeed, it is a sufficient reply to the reason just stated, that although individuals might get along with the business as trustees, and possibly execute the intent of the trust; yet by having corporate powers given them, that intent may be more effectually carried into execution.² The last reason given for the incapacity of a corporation to stand seized of lands to the use of another is, that such seizin is foreign to the purpose of its creation.³ It is evident, however, that this is a mere begging of the question; since the execution of the trust may not only be in consistency with, but even in furtherance of the design for which the corporation was instituted.⁴ Indeed, at the time of passing the statute of Uses, it was unsettled, whether a corporation could take to any other use than its own.⁵ Brook, in the 14th H. 8. inclined to the opinion that such a body might be enfeoffed to an express use,⁶ though he subsequently states it as being the better opinion that it could not.⁷ In the case of Sir Thomas Holland,⁸ a distinction is taken between the capacity of a corporation to be enfeoffed originally to another's use, and its capacity to stand seized to an use, by limiting it out of, or charging it upon its own possessions. Upon this case, Lord Chief Baron Comyn concludes that a corporation may make a deed of bargain and sale, since they may give an use, though they cannot stand seized to an use;⁹ and this conclusion, Rowe says, is now generally received.

¹ The New York Lombard Association, Laws of N. York, 8th April, 1824, ch. 240.

² Trustees of Phillips' Academy v. King, Ex'or., 12 Mass. R. 555, per Thatcher J.

³ 1 Kyd on Corp. 72.

⁴ Trustees of Phillips' Academy, v. King, Ex'or., 12 Mass. R. 555, per Thatcher J.

⁵ Bacon on Uses, Rowe's 113th n.

⁶ Bro. Abr. Tit. Feoff. al. Uses. pl. 10.

⁷ Ibid. pl. 40; Dy. 8 b.

⁸ 3 Leon. 175.

⁹ Com. Dig. tit. Bargain and Sale, B. 3. See also 2 Preston on Convey. 247, 254, 257, 263.

Mr. Cruise, in his valuable Digest, objects to the case of Sir Thomas Holland, as of doubtful authority, inasmuch as the only principle upon which it can be supported, namely, that lands may be charged with an use, was utterly rejected in Chudleigh's case,¹ and states that it is now generally admitted that a corporation cannot stand seized to an use ;² and in the case, *Trustees of Phillips' Academy v. King Ex'or.*,³ Mr. Justice Thatcher informs us, "that if it (the case of Sir Thomas Holland) amounts to anything, it is, that a corporation may be seized to the use of another." According to later authorities, it is said,⁴ that a corporate body may be a trustee, not merely for charitable purposes within the 43 Eliz. ch. 4, sec. 1,⁵ but in all cases in which an individual may act in that capacity.⁶ In this country the rule is, that corporations may be seized of lands, and hold other property in trust, for purposes not foreign to their institution ;⁷ and this appears to us more expedient than the ancient strictness of the law in this particular, and more conformable to principle, than the unlimited doctrine asserted by Jeremy.

In the case, *Trustees of Phillips' Academy v. King, Ex'or.*,⁸ which was an action of debt brought for the recovery of a large legacy, given to an incorporated academy in trust for the benefit of a theological institution connected with it, but with a separate board of visitors, the above doctrine was maintained by the Supreme Court of Massachusetts. Mr. Justice Thatcher, in delivering the opinion of the court, very

¹ 1 Co. R. 127, a.

² 4 Cru. Dig. tit. 32. ch. 9, § 16.

³ 12 Mass. R. 556.

⁴ Jeremy's Equity Jurisdiction, Book 1, p. 19.

⁵ 1 Ves. 536 ; 2 Vern. 412, 454 ; Hob. 136 ; *Atty. Gen. v. Mayor of Stamford*, 2 Swanst. 594.

⁶ 1 Ves. 468 ; *Mayor of Coventry v. Atty. Gen.* 2 Bro. P. C. 235 ; 2 Ves. p. 46.

⁷ 2 Kent, Comm. 226. See *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) R. 237, 238, 239, 240 ; *M'Girr v. Aaron*, 1 Penn. R. 49 ; and see *Greene v. Dennis*, 6 Conn. R. 304.

⁸ 12 Mass. R. 546.

naturally expresses his surprise, that the question, whether corporations are capable of taking and holding property as trustees, should be one of *general* inquiry,—since these bodies are the mere creatures of the legislature, which can invest them with powers more or less enlarged, according to its own good pleasure. “I can only account for the *general* inquiry,” says he, “by supposing that the oldest corporations were of prescriptive origin, and that immemorial usage did not permit them to take property in trust for third persons; and that, instead of reasoning from the abstract nature of corporations, or the power of the crown or parliament to create new ones, lawyers drew too strict a conclusion, in the nature of a maxim, from those in existence, and applied it as a principle of construction to all of a more modern date, as they were beginning to exercise powers in trust.”¹ In the matter of *Howe*,² where it appeared that one had given a legacy to a church-corporation, in trust, to pay the income to his house-keeper for life, and, after her death, to apply it to the purchase of a church library, the support of a sabbath school in the church, and other church purposes, agreeably to the canons of episcopacy, it was held by the Court of Chancery in New York, that the corporation might well execute the trust. “It is a general rule,” says the Chancellor, “that corporations cannot exercise any powers not given to them by their charters or acts of incorporation; and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest. But wherever property is devised or granted to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.”³ The supervisors of a county in New York, who were a corporation for certain special purposes, were, on the other hand, held incapable to take and hold lands as trustees for the use of an individual, or of the inhab-

¹ *Trustees of Phillips Academy v. King Ex'or.*, 12 Mass. R. 553, 554.

² 1 Paige, (N. Y.) Chan. R. 214.

³ *Ibid.* 214, 215.

itants of a village, or indeed, for any other use or purpose than that of the county which they represented.¹

§ 4. A grant of lands, &c. may be made to a corporation by the same charter by which it is created ;² the law giving a priority of operation among things in the same grant, wherever it is necessary to effectuate the objects of the grant. But the mere incorporation of tenants in common, to enable them to carry on more conveniently a common business, does not vest in the corporation a title to land, which had been previously used by the tenants for the same purpose. The title must be conveyed by proper deeds from the individuals to the corporation.³ That a legislative act, passed with the assent of all interested, is *competent* to effect the same purpose, cannot be doubted ; and in a case, in which it appeared that several tenants in common of a lot of land were, on their petition, incorporated for the purpose of building a public house thereon, and the house was nearly completed, and assessments had been laid and paid by all, the Supreme Court of Maine construed the particular act of incorporation before them, as changing the interest of one of those who joined in procuring the act, and assented to all the subsequent expenditures and proceedings under it, from that of a tenant in common entitled to partition, to that of a mere owner of the corporate stock.⁴

But where the minority of a neighborhood, for whose benefit a school-house and land were vested in trustees, formed an association, and procured a charter which vested the property belonging to the association in the corporation, it was held that they could not, by virtue of an article thrown into their charter, appropriate

¹ Jackson v. Hartwell, 8 Johns. (N. Y.) R. 422.

² 2 Ed. 6 ; Bro. Corp. 89 ; Case of Sutton's Hospital, 10 Co. 23, 74, b. ; Jackson ex dem. Trustees of the Parish of Newburgh v. Nestles, 3 Johns. (N. Y.) R. 115 ; Dartmouth College v. Woodward, 4 Wheat. R. 690, 691 ; The People of the State of Vermont v. The Soc. for propagation of the Gospel in foreign parts, 1 Paine, C. C. R. 652.

³ Leffingwell et al. v. Elliott, 8 Pick. (Mass.) R. 455.

⁴ Banger House v. Hinkley, 3 Fairf. (Me.) R. 385.

to the corporation lands, &c., which never belonged to the association.¹

§ 5. 1. It seems never to have been disputed that corporations aggregate might, like natural persons, take lands, &c. by every species of conveyance by deed known to the law. In grants of lands to these bodies, the word "*successors*," though usually inserted, is not necessary to convey a fee-simple; for, admitting that such a simple grant be strictly only an estate for life, yet, as the corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.² In this respect, as well as in many others, a corporation aggregate differs from a corporation sole; a grant of lands to the latter without the word "*successors*" conveying only a life estate.³

As the same presumptions are raised in favor of a corporation as of a natural person, its assent to and acceptance of grants and deeds beneficial to it may be implied, as in case of an individual.⁴ "Suppose," says Mr. Justice Story in his very full and learned opinion in the case, *Bank of the United States v. Dandridge*, "a deed poll granting lands to a corporation, can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law; or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents, be justly admitted by impli-

¹ *The Commonwealth v. Jarrett et. al.*, 7 Serg. & Rawle, (Penn.) R. 460.

² 2 Black. Comm. 109; 1 Kyd on Corp. 74, 104, 105; Co. Lit. 9, b. 94, b; Butler's and Harg. notes; *Union Canal Co. v. Young*, 1 Whart. (Penn.) R. 425; *Overseers of the Poor of Boston v. Sears*, 22 Pick. (Mass.) R. 122.

³ See *Overseers of the Poor of Boston v. Sears*, 22 Pick. (Mass.) R. 122, in which the legal characteristics of the two kinds of corporations are very luminously set forth by Mr. C. J. Shaw.

⁴ *Bank of United States v. Dandridge*, 12 Wheat. R. 64; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 335; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) R. 344; *Union Bank of Maryland v. Ridgeley*, 1 Har. and Gill, (Md.) R. 324; *Apthorp, Treas. v. North*, 14 Mass. R. 167; *Smith et al. v. Gov. and Co. of Bank of Scotland*, 1 Dow, Parl. R. 272; see chap. VIII.

cation to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode, by which it is proved. It is no implied condition, that the corporation shall perpetuate the evidence of its assent in a particular way.¹

2. Where a grant of lands is made to a corporation on condition, the breach of the condition is equally a cause of forfeiture as it would be, had the grant on condition been made to a natural person. The King of Great Britain granted a township in shares to certain individuals, and one share to the society for the propagation of the gospel in foreign parts, upon condition that the grantees, their heirs and assigns should pay rent, and cultivate a certain portion of the land; and it was decided, that no reasons of public policy exempted the corporation from the performance of these conditions; but that the lands granted to it were as much subject to the burthen, as the lands of individual grantees.² The breach of a condition to pay an ear of Indian corn for each share for the first ten years, if lawfully demanded, was considered no ground of forfeiture; as the rent was merely nominal.³ It was held also in this case, that the performance of a condition, that each grantee should pay to the king in his council chamber at Portsmouth, or to such officer as should be appointed to receive the same, a rent of one shilling for every hundred acres during the first ten years, was rendered impossible by the Revolution, and the consequent separation of Great Britain from this country; and that the State, in which the land was, if it had succeeded to the rights of the king as grantor, should have averred and proved that it had appointed another place of payment, or an officer to receive

¹ *Bank of the United States v. Dandridge*, 12 Wheat. R. 70, 72, 73. See the *Proprietors of the Monumoi Great Beach v. Rogers*, 1 Mass. R. 159.

² *The People of the State of Vermont v. The Society for the propagation of the Gospel in foreign parts*, 1 Paine, C. C. R. 652; *King's Chapel v. Pelham*, 9 Mass. R. 501.

³ 1 Paine, C. C. R. 658, 659.

the same, and had given notice thereof to the corporation.¹ Where land was devised to a town for the purpose of building a school-house, and the town neglected for twenty years to comply with the condition, and in the mean time applied part of the rents and profits "for the use of schooling," the residuary devisee recovered the land from the town, as forfeited by breach of the condition.²

3. It is laid down by Mr. Kyd as a general rule, that where a corporation aggregate has by its constitution a head, a grant to that corporation in the vacancy of the headship is void; as if a corporation consist of mayor and commonalty, and a grant be made to it while there is no mayor, or a grant be made to a corporation of dean and chapter when there is no dean, in either case the grant is void; and the reason is, that without the head the corporation is incomplete, and the only act it can do, during the vacancy, is to elect another.³ Littleton,⁴ puts the case of a monastery whose abbot is dead, and says, that in time of vacation, a grant unto them is void, because the convent is but a dead body without a head.

This is true of such a body, consisting of persons dead in the law. Coke, however, in his commentary on this passage,⁵ remarks, that "though the rest of the corporation be no mort persons, as the chapter, in case of dean and chapter, or the commonaltie, in case of mayor and commonaltie, yet cannot they when there is no dean or mayor make claim, *because they have neither abilitie nor capacitie to take or sue any action*, as our author here saith."

The rule seems to have originated in very early times, when that spirit prevailed which produced the statutes of mormain, and when probably the Courts viewed with great strictness grants to bodies corporate. In the case of Sutton's Hospital,⁶ the *existence*

¹ 1 Paine, R. 658, 659.

² Hayden v. Stoughton, 5 Pick. R. 528.

³ 1 Kyd on Corp. 106; 13 Ed. 4, 8; 18 Ed. 4, 8; Bro. Corp. 58, 59; Dalton, 31.

⁴ 1 Inst. 264.

⁵ Co. Lit. 264.

⁶ 10 Co. R. 31 a, 31 b.

of the corporation if immediately incorporated by the letters patent previous to the naming of a master by the founder, and previous to the building of the hospital, is expressly stated by the Court ; " for when a corporation is created by letters patent, by the same patent power is given to the body to choose a mayor, aldermen, or bailiffs, governors, or the like, and yet they are immediately incorporated by the same letters patent.¹ And it is true, it is immediately by the letters patent a corporation *in abstracto*, but not *in concreto* till the naming of the master." The *continued* existence of the corporation, notwithstanding the death of its members or officers, is as expressly stated in the same case ; " for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law ; and therefore in 39 H. 6, 13, b. 14, a dean and chapter cannot have predecessor nor successor."² The grant was not held void, therefore, because it was thought that the corporation did not exist in the vacancy of its headship, but because, as is stated by Mr. Kyd, " without the head, the corporation is incomplete, and the only *act* it can do during the vacancy is, to elect another."³ Some *act* was to be done by the corporation in order to the acceptance of the grant ; and we find that Littleton,⁴ and Sir Edward Coke,⁵ place the taking of a grant by a corporation upon the same footing with the making of a claim, and the suing of an action, which require something positive to be done. The incapacity of a corporation, therefore, to take a grant of lands in the vacancy of its headship, probably grew out of the well established doctrine of early times with regard to common law corporations, that they could not signify their assent, as, accept a deed, but by writing under their common seal. This act they could not do, any more than any other, until the body was duly organized according to its constitution, by the election of a new

¹ Plow. Comm. 592. b ; Cook's Case, 21 E. 4, 59 b ; 3 H. 7, Grant 36 ; 32 E. 3, Aid. 39 ; 13 E. 4, 8, b. & 16 E. 3, Grant 65.

² 10 Co. R. 32 b ; Case of Sutton's Hospital.

³ 1 Kyd on Corp. 106 ; Co. Lit. 264.

⁴ 1 Inst. § 443.

⁵ Co. Lit. 264.

head ; and hence, as a freehold cannot be granted to commence *in futuro*, the grant was inoperative at its inception, and therefore void. At this day in England,¹ and certainly in this country, as we have before shown, the acceptance by a corporation of a grant or devise, beneficial to it, may as well be *presumed*, as in favor of an individual. As no act is now necessary to be done, in order to the acceptance of a deed or devise by a body corporate, and the existence of a corporation is clear notwithstanding the vacancy of its headship, we see no good reason why a benefaction, perhaps highly meritorious, should be defeated by an accidental death. We find no recent decision in England, and none in this country directly upon this point ;² but may be allowed to doubt, whether the general rule above laid down, however proper to the old corporations of the common law, would be applied in this country to our commercial, religious, and literary corporations created by statute. Our view of this subject is, we think, greatly supported by the fact, that it was always held, that where a particular tenant for life, or in tail, was created by the grant, who might accept the deed and estate in privity with the corporation, a remainder to the corporation was good, notwithstanding the vacancy of its headship, provided that, during the continuance of the particular estate, a new head was chosen. If, during the vacation of the abbacy of Dale, a lease for life, or a gift in tail had been made, the remainder to the abbot of Dale and his successors, this remainder would have been good, if an abbot had been chosen during the continuance of the particular estate. And if there be mayor and commonalty of D, and the mayor die, a grant made to the mayor and commonalty of D is void ; but if a lease for life be made, with remainder to the mayor and commonalty of D, the remainder will be good, if during the continuance of the particular estate a new mayor be elected.³ King Edward III. newly founded a priory, and granted to the monks that they might choose a prior, and before a prior was chosen, W made a lease to one A for life, the remainder to the

¹ Smith et al. v. Governor and Company of the Bank of Scotland, 1 Dow's Parl. R. 272 ; Lord Redesdale.

² See Rathbone v. Tioga Navigation Co. 2 Watts & Serg. (Penn.) R. 74.

³ Co. Lit. 264 a.

prior and convent ; and in *scire facias* against A, he pleaded, that W was seized in fee, and leased to A, the remainder to the prior and convent, who were newly founded by the King, and, because there was not yet a prior, he prayed aid of the King, in whom the right was, until a prior was chosen ; the aid by award was granted, and a writ of *procedendo* came ; then A, the defendant showed, that after the aid granted, a prior was chosen, in whom the remainder vested, and prayed aid of the prior, but was ousted of the aid, *because he had aid before*, “which proves,” says Lord Coke, “that the remainder in such case is good.”¹ A grant, however, in remainder to a corporation, *when no such corporation exists*, is void, though such a corporation be erected before the expiration of the particular estate.²

§ 6. 1. The common law right of taking *personal* property by *bequest* was, we believe, always enjoyed by corporations equally with individuals.³ The want of capacity, however, to transfer and receive the freehold, though not deduced from the principles of the ancient common law of England, was, by feudal policy, engrafted upon the system of jurisprudence prevailing in that country at the time of the conquest ; and the disability of aliening by devise was not removed until long after the power of alienation by deed had been fully established, nor until long after the doctrine of uses had been introduced. We may collect indeed from the recitals and provisions of ancient acts of parliament, and the language of early reports, that devises of lands had grown into use anterior to the statute of wills ; but until the time of Henry VIII. no trace of any statute authority is discovered for the practice. The statutes 32 H. 8, c. 1, and 34 H. 8, c. 5, commonly called the statutes of wills, gave liberty to every person having a sole estate in fee-simple of any manors, &c., “To give, dispose, will, or devise to any person or persons,

¹ The case of *Sutton's Hospital*, 10 Co. R. 31, b.

² Hob. 33.

³ 2 Atk. R. 37 ; 2 Bro. 58 ; *Trustees of Phillips' Academy v. King*, Exr. 12 Mass. R. 546 ; In the matter of *Howe*, 1 Paige, (N. Y.) Chan. R. 214 ; *McCartee v. Orphan Asylum Society*, 9 Cowen, (N. Y.) R. 437.

except to bodies politic and corporate, by his last will and testament in writing, or otherwise by any acts lawfully executed in his life-time, all his manors, &c. at his own will and pleasure, any law, statute, custom, or other thing, theretofore had, made, or used, to the contrary notwithstanding." By the express exception in these statutes, corporations were not enabled in England to take lands, &c. directly by devise, — and we find the same exception in the New York statute of wills, with the same effect of course following upon it.¹ The exception was unquestionably made to prevent the extension of gifts in mortmain;² but in England, by construction of the statute 43 Eliz. c. 4, commonly called the statute of charitable uses, it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *devise*, and the Court of Chancery will support and enforce the charitable donation.³ Where the statute of wills excepts bodies politic as competent devisees, the usual power given to corporations by charter, or act of incorporation to *purchase* lands, &c. has been construed not to qualify them to take by devise, the word "*purchase*" being understood in its ordinary, and not in its general and technical sense.⁴ But where a corporation was created for the express purpose of taking certain property devised, and enabled by the act of incorporation for that purpose, the act of course operated as a repeal of the statute of wills *pro tanto*.⁵

In those states, whose statutes of wills do not contain the exception above, we need hardly add that corporations are capaci-

¹ 1 Greenleaf's ed. Laws N. Y. 387; *Jackson v. Hammond*, 2 Caine's Cas. in Error, 337; *McCartee v. Orphan Asylum Society*, 9 Cowen, (N. Y.) R. 437; 2 Kent, Comm. 230.

² 2 Black, Comm. 375; *McCartee v. Orph. As. So.*, 2 Cowen's (N. Y.) R. 461; per Jones, Chan.

³ 2 Black, Comm. 375, 376; 2 Kent, Comm. 230; *Baptist Association v. Hart's Ex'ors.* 4 Wheat. R. 31, per Marshall Ch. J.

⁴ *Jackson v. Hammond*, 2 Caine's (N. Y.) Cas. in Err. 337; *McCartee v. Orph. As. So.* 9 Cowen, (N. Y.) R. 507, 508; *Canal Co. v. Rail Road Co.*, 4 Gill & Johns. (Md.) R. 1.

⁵ *Inglis v. The Trustees of the Sailor's Snug Harbour*, 3 Peters, R. 119, per Thompson J.

tated to take by devise under the words "*person or persons*" — and the like — and this view is confirmed by the words of the English statutes of wills which empower every person having a sole estate in fee-simple to give his manors, &c. "to any *person or persons*, except to *bodies politic and corporate*."

2. In those states whose statutes of wills except bodies politic and corporate, as competent devisees, a very important and difficult question may arise, whether - (there being no statutes of mortmain) though corporations cannot take lands directly as devisees, they may not take a use, the lands being devised to trustees for their benefit in such a manner as not to be affected by the statute of uses. The use or trust of lands, as distinct from the land itself may be devised : and it was upon this property of a use, that long anterior to the statute of wills, the general power of devising was indirectly acquired.¹ And this indirect method of disposing of lands by devise was recognised, and sanctioned by the statutes 7 H. 7, ch. 3, and 16 H. 8, ch. 14. One mode was to convey the lands to feoffees to the use of the will, and then to declare the uses of the feoffment by the will. It may be observed, however, that in this mode of disposition, the estate took effect by force of the feoffment, and the use was merely declared and directed by the will ;² whereas in the question we are considering, the whole disposition, both of the land and the use, is by force of the will. It is nevertheless true, that supposing no statutes of mortmain, and no incapacity on the part of the corporation to take lands, the only difficulty is in taking them in a *particular mode*, to wit, by devise, in consequence of the exception in the statute. The trustees, being natural persons, may of course take the legal estate in this way, and the question appears to be narrowed down to this, whether previous to the statute of wills, and now independent of it, a corporation can take an use by devise and by *the mere force* of the devise. The practice of devising copy-hold estates, which are not affected by the statute of wills, is supposed to be a practical illustration

¹ 1 Saund. 72.

² Co. Lit. 272. See 462, 463 ; Sir Edward Clerc's Case, 6 Co. R. 18.

of the right of a corporation to take an use by devise. It may be objected here too, that the will operates merely as a declaration of the uses of the surrender; and that it is the surrender, and not the will, which *passes* the use. In *McCartee v. Orphan Asylum Society*,¹ this question was considered by Chancellor Jones, and in a very learned and elaborate opinion, he concluded that in the case stated, a corporation might take an use by devise. The decree in this case was afterwards reversed by the Court of Errors in New York, but upon the ground, that by the devise before them the lands were given *directly* to the corporation, and not to trustees for its use.² The question may still, perhaps, be considered as open to discussion and decision. In New York it has been settled by legislation; it being provided in the Revised Statutes, that a devise of real property in trust for a corporation is void, unless such corporation is expressly authorized to take in this manner by statute or charter.³ Whether under the provisions of these statutes a pecuniary legacy to a corporation, payable out of the proceeds of real estate which the executors are directed to sell, is valid, is perhaps a question. Previous to the revision such a legacy was considered good, although the corporation was not authorized to take real estate by devise.⁴

The statute of 43 Eliz. ch. 4, of charitable uses is in force in North Carolina⁵ and Kentucky,⁶ and by virtue of it, the Courts of Equity in those States have jurisdiction over charities; although they do not carry out the English doctrine of *Cy-pres*.⁷

¹ 9 Cowen, (N. Y.) R. 437; and see *Shepherd's Touchstone*, Tit. Devise; *Porter's Case*, 1 Coke, R. 22; *Chadleigh's Case*, 1 Coke, R. 121; *Griffith Flood's Case*, Hob. 136; *Attorney General v. The Master of Brentford School*, 1 Mylne & Keene, 376, reporting case of Sir Anthony Brown's will, decided previous to the statute of Eliz. and after the statute of wills.

² *McCartee v. Orphan As. Soc.* 9 Cowen, (N. Y.) R. 504, *Woodworth J.*

³ *Theological Seminary of Auburn v. Childs*, 4 Paige, (N. Y.) Ch. R. 419.

⁴ *Ibid.*

⁵ *Griffin v. Graham*, 1 Hawks, (N. C.) R. 96.

⁶ *Gass v. Wilhite*, 2 Dana, (Ken.) R. 170.

⁷ *McAuley v. Wilson*, 1 Dev. (N. C.) Ch. R. 276; *Moore v. Moore*, 4 Dana, (Ken.) R. 357.

In Virginia it was repealed in 1792 ;¹ and we know of no other States in the Union in which it is in force, except the two above mentioned.² In both Maryland and Virginia bequests have been adjudged void, as indefinite, upon the ground that this statute was not in force in those States.³ Its doctrines, however, are, by the third section of the declaration of rights, prefixed to the Constitution of Maryland, so far recognised as to render valid a dedication of a lot of land to public and pious uses, even though there be no specific trustee or grantee ; the lot having upon the faith of the dedication been built upon and used as a burial ground.⁴

In Pennsylvania⁵ and Massachusetts,⁶ the principles which the English Court of Chancery has adopted respecting charitable uses, under the statute of Elizabeth, obtain, not indeed by force of the statute, but as part of their common law ; and where the object is defined, and they are not restrained by the inadequacy of the common law forms, which they are compelled to employ, their courts give relief nearly to the extent that chancery does in England. The broad discretion exercised by the English Chancellor, under the doctrine of *cy-pres*, would not, and indeed could not, be exercised by common law courts.⁷

In those states in which the statute of Elizabeth is in force, or

¹ *Gallego v. Attor. Gen.* 3 Leigh, (Va.) R. 450 ; *Taney's Ex'rs. v. Latane*, 4 Ibid. 327.

² 2 Kent, Comm. 285 ; *Union Baptist Soc. v. Candia*, 2 N. Hamp. R. 21 ; *Baptist Soc. v. Wilton*, 2 N. Hamp. R. 510.

³ *Dashiell v. Attor. Gen.* 5 Har. & J. (Md.) R. 392 ; 6 Har. & J. (Md.) R. 1 ; *Gallego v. Attor. Gen.* 3 Leigh, (Va.) R. 450 ; *Taney's Ex'rs. v. Latane*, 4 Ibid. 327.

⁴ *Beatty & Ritchie v. Kurtz et al.* 2 Peters, R. 566.

⁵ *Witman v. Lex*, 17 Serg. & R. (Penn.) R. 88 ; *Mayor &c. Philadelphia v. Elliott*, 3 Rawle, (Penn.) R. 170 ; *McGirr v. Aaron*, 1 Pennsylv. R. 49. See *Browsers v. From*, Addis. (Penn.) R. 362.

⁶ *Going v. Emery*, 16 Pick. (Mass.) R. 107 ; *Sanderson v. White*, 18 Pick. (Mass.) R. 333 ; 4 Dane, Abr. 6 ; *Bartlett v. King*, 12 Mass. R. 537 ; *Milton v. First Parish in Milton*, 10 Pick. (Mass.) R. 447 ; *Rice v. Osgood*, 9 Mass. R. 38 ; and see *Shapleigh v. Pilsbury*, 1 Greenl. (Me.) R. 271.

⁷ *Witman v. Lex*, 17 Serg. & R. (Penn.) R. 93. See *Sanderson v. White*, (in Equity), 18 Pick. (Mass.) R. 333, opinion of Mr. Ch. J. Shaw.

its doctrines have been adopted as part of their common law, there would probably be no difficulty in sustaining a direct devise, and a *fortiori* a devise of an use to a corporation for charitable purposes, notwithstanding corporations were excepted out of their statutes of wills.

A question of more difficult solution is, whether wholly independent of the statute of charitable uses, and of the doctrines which have grown up under it, and admitting corporations in general cannot take as *cestuis que trust* under a devise, courts of equity may not sustain and enforce a devise to or for the use of a corporation, *provided the object be a charity in itself lawful and commendable*, notwithstanding an exception of bodies politic and corporate as competent devisees in the statute of wills. Previous to the statute of Elizabeth, the history of the law of charitable bequests is extremely obscure; and so few traces remain of the exercise by Chancery of a jurisdiction over them, that Lord Loughborough informs us, that "prior to the time of Lord Ellesmere (who presided in the Court of Chancery very shortly after the statute of Elizabeth went into operation) there was no information in the Court in which he was sitting; but they made out the case as well as they could by law."¹ This was the course in Porter's Case,² decided in the 34th and 35th years of Elizabeth. We have, however, the testimony of some of the most able jurists and equity judges in England, that the Court of Chancery in that country, from times of very high antiquity, and long before the statute of Elizabeth, had cognizance of informations filed by the attorney general for the establishment of charities; and that the equity powers of the Court were applied, though not so beneficially as in after times, to cases of charitable uses. Sir Joseph Jekyll, Master of the Rolls, sitting as commissioner, informs us, that in case of a charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's

¹ Attor. General v. Bowyer, 3 Ves. 714, 726.

² 1 Co. R. 22 b.

practice to file informations in chancery, in the attorney general's name, for the establishment of charities.¹ Lord Somers takes notice, too, that several things are under the care and superintendency of the king as *parens patriæ*, and instances *charities*, idiots, lunatics, and infants;² and in several cases, Lord Hardwicke also refers to the original jurisdiction of Chancery over the subject of charities, previous to the statute.³

Henley, keeper, afterwards Lord Chancellor Northington, is decisive and strong in his opinion on this point; "I take," says he, "the uniform rule of this Court, before and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses;" and he illustrates his meaning by the example of a devise to a body corporate to charitable uses; thus, he observes, "though devises to corporations were void under the statutes of Henry VIII., yet they were always considered as good in equity, if given to charitable uses."⁴

In the case of *Attorney General v. Mayor of Dublin*,⁵ Lord Redesdale affirms that it created no new law on the subject, but only a new and ancillary jurisdiction in the commissioners. The opinion of Lord Eldon evidently was, that previous to the statute the Court of Chancery had the power to render effective an imperfect conveyance for charitable uses.⁶

In the case of *Attorney General v. the Master of Brentford School*,⁷ we learn that a decree was made in chancery, in the

¹ *Eyre v. Countess of Shaftsbury*, 2 Peere Wms. 119.

² *Lord Falkland v. Bertie*, 2 Vern. R. 333.

³ *Bailiffs, &c. of Burford v. Lenthall*, 2 Atk. R. 550; *Attorney General v. Middleton*, 2 Ves. 327; *Attorney General v. Tancred*, 1 Wm. Black. R. 90; *S. C. Ambler*, 351; 1 Eden, R. 10.

⁴ *The Attorney General v. Tancred*, 1 Eden. 10; *S. C.* 1 Wm. Black. R. 90; and see *Wilmot's Opinions*, 24, 33; *White v. White*, 1 Bro. R. 15; *Moggridge v. Thackwell*, 7 Ves. 69; *Weleden v. Elkinton*, Plowden, 523; *Duke on Charitable Uses*, 154, and *Moore's Readings*.

⁵ 1 Bligh, Parl. R. 347, 348.

⁶ *Moggridge v. Thackwell*, 7 Ves. 69; *Attorney General v. Skinners Company*, 2 Russell, 407.

⁷ 1 Mylne & Keene, 376.

12th year of the reign of Elizabeth, before the statutes of charitable uses, at the suit of the inhabitants of the parish of Southweald against the heir at law, that he should execute a conveyance for the purpose of providing for the maintenance of the master of a grammar school, and "five poor folks," according to the intent of Sir Anthony Brown, as expressed in his will. The Master of the Rolls, Sir John Leach, expresses himself very decidedly on the subject of that decree; "That at that time no *legal* devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust, which a court of equity would then execute."

Indeed, it seems to be placed beyond question by the Readings of Sir Francis Moore, who penned the statute, and the few cases before the statute, contained in *Duke on Charitable Uses*,¹ not only that the Chancellor had the jurisdiction contended for, but exercised it upon the same principles, which have been incorrectly attributed to the act of Elizabeth.

It would appear too, from the preamble to the statute of Elizabeth, that the only object of it was not to give new validity to charitable donations, but rather to provide a new and more effectual remedy for breaches of those trusts;² and this view of the subject is confirmed by the reports of the early adjudications under the statute.³ Indeed, the elements of the doctrine of the English Chancery, in relation to charitable uses, do not seem to have originated with the statute of Elizabeth, but are traceable to the civil law;⁴ and in *White v. White*, Lord Thurlow expressly says, "the cases had proceeded on notions derived from the Roman or civil law."⁵

¹ *Duke on Charitable Uses*, 131, 154, 155, 163; *Case of Sir Anthony Brown's will*, found in *Attorney General v. The Master of Brentford School*, 1 Mylne & Keene, 376.

² 2 Kent, Comm. 232; *McCartee v. Orphan Asylum Society*, 9 Cowen, (N. Y.) R. 477, per Jones, Chancellor.

³ *Griffith Flood's Case*, Hob. 136; see, however, 1 Chan. Cas. 134, 237; 6 Dow, 136.

⁴ Code, lib. 1, t. 2, § 19, 26, tit. 3, § 38; Dig. 38, 2, 16; Strahan's note to Domat, b. 1, tit. 1, § 16; Swinburne, part 6, § 1; 2 Domat, b. 3, tit. 1, § 6; b. 4, tit. 2, § 2, 6; b. 3, tit. 1, § 16; 2 Kent, Comm. 231.

⁵ 1 Bro. Chan. Cas. 15.

In the case of *Baptist Association v. Hart's Ex'rs.*,¹ where it appeared that a bequest had been made to an unincorporated association, for the purpose of educating youth of the Baptist denomination for the ministry, it was the opinion of the Supreme Court of the United States, as delivered by Mr. Chief Justice Marshall, that charitable bequests, *where no legal interest was vested*, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a Court of Equity, exercising its ordinary jurisdiction, independent of the statute of Elizabeth. Mr. Justice Story, in a very learned and elaborate opinion in this case, subsequently published, after a very full and critical investigation of all of the authorities bearing upon this point, came to the conclusion, "that the jurisdiction of the Court of Chancery over charities, *where no trust is interposed, or there is no person in esse capable of taking, or where the charity is of an indefinite nature*, is not to be referred to the general jurisdiction of that Court, but sprung up after the statute of Elizabeth, and rests mainly on its provisions."²

The Supreme Court of Connecticut decided, that a devise of a farm to the "yearly meeting of people called Quakers, in aid of the charitable fund of the boarding-school established by the Friends in Providence," which was not incorporated, could not be sustained as a charity.³

The two last quoted cases, do not, it is true, bear directly upon the question we are considering; as they seem to have been decided upon the special ground, that as the objects of the testator's bounty, not being incorporated, were incapable of taking, and the words of the gifts were *in presenti, and no trusts interposed to save them*, in common law phrase, they must fall to the ground.⁴ The high authority, which the learning of the Supreme Court of the United States gave to their opinion, has thrown a doubt over the subject of equity jurisdiction in case of charitable

¹ 4 Wheat. R. 1, S. C.; 1 Henning & Munf. (Virg.) R. 471 to 476.

² 3 Peter's R. Appendix, 481.

³ *Greene v. Dennis*, 6 Conn. R. 292.

⁴ Com. Dig. Devise K.; 1 Roll. Abr. 909; Com. Dig. Chancery 2, N. 1; *Widmore v. Woodroffe*, Amb. 636, 640.

uses, without the aid of the statute of Elizabeth, which, in a matter so interesting to the benevolence of the country, cannot but be lamented. In a subsequent case of great importance,¹ the court seems to have receded, in fact, from the ground taken in the case alluded to; and upon that account the decree was not concurred in by the venerable Chief Justice, and Mr. Justice Story. Later decisions² by the same Court seem to have been thought to give evidence of a still farther recession;³ though they are clearly defensible upon the familiar principle of dedications of lands to public uses, always supported, even though made without deed, where the intent to dedicate is clearly manifested by the owner, especially if others upon the faith of the dedication have been led to act in a manner prejudicial to them, if a resumption of the grant were permitted. Strong dissatisfaction with the decision in *Baptist Association v. Hart's Ex'rs.*,⁴ upon the grounds taken by the Court, seems to have been manifested by Jurists and Courts in this country.

In a case of great importance, the question came directly before the Supreme Court of Vermont, in Chancery; and after several arguments, and great research on the part of both Court and Counsel, it was decided, that Courts of Chancery had jurisdiction of bequests to charitable uses, before the statute of Elizabeth, by virtue of their ordinary equity jurisdiction; that the law now established in relation to donations to charitable uses, is not derived from that statute, but existed anterior; and that such donations to an unincorporated society—as, to the the Treasurer, for the time being, of the American Bible Society, will, by general law, be upheld.⁵

¹ *Inglis v. Sailors' Snug Harbor*, 3 Peters, R. 153.

² *Beatty et al. v. Kirtz et al.* 2 Peters, R. 566; *City of Cincinnati v. White*, 6 Peters, R. 631; *Barclay et al. v. Howell's lessee*, 6 Peters, R. 498; *New Orleans v. United States*, 10 Peters, R. 498; and see *McConnell v. Trustees of Lexington*, 12 Wheat. R. 582.

³ *Ex'rs of Burr v. Smith et al.* 7 Vermont R. 302, 303, 304, Williams, Chancellor.

⁴ 4 Wheat. R. 1.

⁵ *Executors of Burr v. Smith*, 7 Vermont R. 241, where the reader will find in the arguments of counsel and the opinion of Williams, Chancellor,

Chancellor Walworth asserts "that it is generally admitted that the decision, in *Baptist Association v. Hart's Ex'ors.* case, is wrong; and that it may now be considered as an established principle of American Law, that a Court of Chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, provided the same is consistent with local laws, and public policy; where the object of the gift or dedication is specific, and capable of being carried into effect, according to the intention of the donor."¹

In *McCartee v. The Orphan Asylum Society*,² Chancellor Jones, waiving the questions, whether a Court of Chancery, independently of the statute of Elizabeth, would support a devise to charitable uses, where no legal interest was vested on account of the too vague description of those who were to take, and whether an information in the name of the attorney general of the State would be necessary in such case, if the devise could be supported, as was intimated by the Supreme Court of the United States,³ decided, that a Court of Chancery may, independently of the statute of Elizabeth, support a devise to trustees for the use of a charitable corporation, notwithstanding an exception of bodies

a very learned and laborious discussion of all the cases and considerations bearing upon the point. See also *Coggeshall v. Pelton*, 7 Johns. (N. Y.) Ch. R. 292; 2 Kent, Comm. 231; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters, R. 153; *Griffin v. Graham*, 1 Hawks, (N. C.) R. 96; *Witman v. Lex*, 17 Serg. & R. (Penn.) R. 88; *Mayor and Corporation of Philadelphia v. Elliott*, 3 Rawle, (Penn.) R. 170; *Going v. Emery*, 16 Pick. (Mass.) R. 107; *Milton v. First Parish in Milton*, 10 Pick. (Mass.) R. 447; *Rice v. Osgood*, 9 Mass. R. 38; *Hadley v. Hopkins Academy*, 14 Pick. (Mass.) R. 253; *Sanderson v. White*, 18 Pick. (Mass.) R. 333; *Stone v. Griffin*, 3 Vermont R. 400; *Lockport v. Weed*, 2 Conn. R. 287; *Shapleigh v. Pilsbury*, 1 Greenl. (Me.) R. 271; *Baptist Church v. Witherell*, 3 Paige, (N. Y.) Chan. R. 296.

¹ *Potter v. Chapin*, 6 (N. Y.) Ch. R. 649, and see *Dutch Church in Garden Street v. Mott*, 7 Paige, (N. Y.) Ch. R. 77, and *Moore v. Moore*, 4 Dana, (Ky.) R. 357, in which case the equity jurisdiction over charitable bequests and trusts was ably discussed by C. J. Robertson, in delivering the opinion of the Court.

² 9 Cowen, (N. Y.) R. 437.

³ *Baptist Association v. Hart's Ex'ors.* 4 Wheat. 50; 3 Peters, R. Appendix, 498, Opinion of Story, J.

politic and corporate as competent devisees, in the statute of wills. In the opinion of the Chancellor delivered in this case, a very full view and elaborate discussion was had of all the cases bearing upon the point; and the power of Chancery over charitable donations, abstracted from the statute of Elizabeth, was very learnedly and critically considered. The decree, as we before stated, was afterwards reversed in the Court of Errors, but the reversal proceeded upon the ground, that the devise was made *directly* to the corporation, and not to trustees for its benefit. This question, at least, may hardly be considered as open, the weight of opinion and argument being in favor of an original and necessary jurisdiction in Chancery, in respect to bequests and devises in trust, *to persons competent to take for charitable purposes, when the general object of the charity was specific and certain, and not contrary to any positive rule of law.*¹

A devise to a corporation, *to be created* by the legislature, is held good as an executory devise, a distinction being taken between a devise *in presenti* to persons incapable, and a devise *in futuro* to an artificial being, to be created and enabled to take.²

§ 7. In instruments granting, devising, or bequeathing lands and other property to corporations, and in grants by them, a misnomer of the corporation does not vitiate, provided the identity of the corporation with that intended by the parties to the instrument is apparent.³

¹ 2 Kent, Comm. 287, 288, 4th ed.

² Porter's Case, 1 Co. R. 24; Case of Sutton's Hospital, 10 Co. 32; Attorney General v. Bowyer, 3 Ves. 714; Inglis v. Sailors' Snug Harbor, 3 Peters, R. 115 to 120, 144; McGirr v. Aaron, 1 Penn. R. 49; Sanderson v. White, 18 Pick. (Mass.) R. 356, 357. It is not within the range of our subject to treat particularly of the effect of the statute of Elizabeth upon grants and devises to individuals and corporations for charitable uses; but we would refer the inquirer to Duke's valuable treatise on this subject, 2 Fonbl. Eq. 209 to 226, and notes, and to 4 Wheat. R. Appendix, 3 to 23, where the principles and decisions under the statute of Elizabeth are very faithfully brought together by the learned reporter.

³ See Chap. VIII, and cases, Chancellor, &c. of Oxford, 10 Co. R. 59; Cowden v. Clerk, Hob. 32; Owen, 35; Foster v. Walter, Cro. E. 106; First Parish in Sutton v. Cole, 3 Pick. (Mass.) R. 236.

A corporation aggregate cannot hold lands in joint-tenancy with a natural person, because, as the corporation never dies, the natural person would be subject to, without being able to take advantage of, the incident of survivorship. Such a corporation may, however, hold lands in common with a natural person, survivorship not being an incident to lands so holden.¹

§ 8. There is a *dictum* of Mr. Chief Justice Parsons, "that a corporation cannot acquire a freehold by a disseizin committed by itself."² No authority is cited by the learned judge; but from some very early cases we should infer that, as a general doctrine, this could never have been true. Thus, it is laid down,³ that a corporation cannot be aiding to a trespass, nor give a warrant to do a trespass without writing; and it appears from the case cited,⁴ that a corporation cannot give a command to enter into land, without deed, nor do anything which vests or divests a freehold, *nor accept a disseizin made to their use, without deed*. It is said, too, by Fitzjames, Justice,⁵ that *a corporation cannot do a tort but by their writing under their seal*; which imports that *by their writing* they may.

Quare impedit lies against the corporation, though the hindrance is an act of tort.⁶ The statute, 9 Hen. 4, c. 5. recites the practice in assizes of novel "disseizin and other pleas of land, of naming the mayor and bailiffs and commonalty of a franchise, as disseizors, in order to oust them of holding plea thereof; and directs the inquiry before the judges of assize, whether they be disseizors or tenants, or named by fraud," which plainly proves that they may be considered as disseizors. Brook also puts the case, "if the mayor and commonalty disseize me, and I release to twenty, or two hundred of the commonalty; this will not serve

¹ Pl. Comm. 239; 2 Lev. 12; 2 Black. Comm. 184; 1 Kyd on Corp. 72.

² *Weston v. Hunt*, 2 Mass. R. 502.

³ Bro. Corporations, pl. 48.

⁴ 4 H. 7, 9; 4 H. 7, 16.

⁵ 14 H. 8, 2, 29; Bro. Corporations, pl. 34.

⁶ *Butler v. Bishop of Hereford and the University of Cambridge*, Barnes, C. P. 350; and see *Rast*, 497; *Ast*, 378; 2 Mod. Ent. 201; *Winch*, 625, 700, 721, 733; 2 Lut. 1100; 3 Lev. 332.

the mayor and commonalty ;” and the reason is, because the disseizin is in their *corporate* character, and the release is to the individuals.¹ Indeed, no principle with regard to corporations seems to have been earlier or more fully established; than that they might acquire a freehold by disseizin; though in conformity with the strictness of the old law in relation to them, it was also considered, that if a disseizin be made to their use, they could not agree to, or accept it without deed, or in other words, without writing under their common seal.² From the ancient decisions with regard to the corporations of the common law, it would seem that the prevalent opinion was, that they could authorize no agent, do no act, give no assent, except in matters of the most trifling importance, but by deed. This notion, even with regard to the old corporations, and in England, has been greatly relaxed; and in regard to the corporations of modern times created by statute, has, in our own country at least, never been entertained. We have endeavored elsewhere fully to discuss this subject, and would refer the reader to the authorities there collected.³ From the current of modern decisions there can be no doubt, that a corporation, equally with an individual, may gain a freehold by a disseizin committed by its agent, whether authorized by deed, or vote, — and that the authority of the agent, and the acceptance of his act by the corporation, may be proved by the acts and conduct of the corporation, whether manifested by it collectively, or through its officers, agents, tenants, &c.⁴ In *Magill v. Kauffman*, which was ejectment for land claimed by a Presbyterian congregation, before incorporation, under a purchase by their trustees, and after incorporation claimed in their right as a corporation, the Supreme Court of Pennsylvania held, that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting the business of the corporation, and also evidence by witnesses of what passed at the

¹ Bro. Corporations, pl. 24; and see 44 Ed. 2; 2 pl. 5; 8 H. 6, 1, 14; 4 H. 7, 13; 14 H. 8, 2; *Yarborough v. Bank of England*, 16 East, 8, 9, per. Ellenborough, C. J.

² *Yarborough v. Bank of England*, 16 East. 8, 9; 1 Kyd on Corp. 263, 264.

³ See Chap. VIII, and Chap. IX.

⁴ *Ibid.*

meetings of the congregation when assembled on business, were admissible to show their possession of the land, and the extent of their claim of its boundaries.¹ And where an act of the legislature authorized the trustees of a corporation to take possession of land, and the trustees accordingly entered upon it and disseized the owner, the authority thus derived was deemed equivalent to an authority from the corporation under its common seal.² The Supreme Court of Massachusetts fully recognise the doctrine, that a corporation may acquire a title to land by disseizin and exclusive adverse possession, although such disseizin was not authorized by deed; and in this respect is bound by, and entitled to, the same implications from its corporate acts, as an individual.³

§ 9. Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels, unless specially restrained by their charters or by statute.⁴ Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity.⁵ The circumstance, that the state holds some of the stock of the corporation, does not at all affect the right of alienating its property; the stock of the state being as much subject to the exercise of this right as the stock of an individual.⁶ In England this common law right of disposition has been greatly restrained, on the part of religious corporations, by numerous statutes from the statute of

¹ 4 Serg. & R. (Penn. R. 317; and see *Wood v. Tate*, 5 Bos. & Pul. 246; *Doe v. Woodman*, 8 East, R. 228; *Bank of the United States v. Dandridge*, 12 Wheat. R. 64; Opinion of Story J.

² Second Precinct in *Rehoboth v. Carpenter*, 23 Pick. (Mass.) R. 131; Same v. Catholic Congregational Church and Society in Rehoboth, 23 Pick. (Mass.) R. 139; *Milton v. First Parish in Milton*, 10 Pick. (Mass.) R. 447.

³ Ibid.

⁴ Co. Lit. 44 a, 300 b; 1 Sid. 161, note at the end of the case. The case of *Sutton's Hospital*, 10 Co. 30 b; 1 Kyd on Corp. 108; Com. Dig. Tit. Franchise F. 11, 18; 2 Kent, Comm. 227.

⁵ 2 Kent, Comm. 227; *The Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & Bea. 226, 237, 240, 244; *Binney's case*, 2 Bland, (Md.) Chan. R. 142.

⁶ *Binney's case*, 2 Bland, (Md.) Chan. R. 142.

Westminster the second, 13 Ed. 1, ch. 41, to 5 Geo. 3, ch. 17; and particularly by several statutes passed in the reign of Elizabeth.¹ These disabling statutes have not, we believe, been re-enacted in this country; though Kent informs us, that "the better opinion upon the construction of the statute of New York, *for the incorporation of religious societies*,² is, that no religious corporation can sell any real estate without the Chancellor's order.³ It would seem, however, that this statute applies only to *absolute* sales; and that the Chancellor's order is not necessary to warrant the sale of *pews* in a church, in which the interest granted is merely limited and usufructuary.⁴

How far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon those general principles, which guide it in the exercise of its powers; but there is little doubt that, in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes.⁵

2. A corporation authorized to dispose of its property may in general dispose of any interest in the same, it may deem expedient, having the same power in this respect as an individual.⁶ Thus it may lease, grant in fee, in tail, or for term of life,⁷ mortgage,⁸ and though insolvent, assign its property in trust for the payment of its debts,⁹ defeating by preferences, where the law allows it,

¹ 1 Kyd on Corp. 116 to 162; 2 Kent, Comm. 227.

² Laws of N. Y. vol. 2, 212; 3 Rev. Stat. N. Y. 298.

³ 2 Kent, Comm 227, 228.

⁴ Freligh v. Platt, 5 Cowen, (N. Y.) R. 494.

⁵ Binney's case, 3 Bland, (Md.) Chan. R. 142.

⁶ Reynolds v. Commissioners of Starks County, 5 Ham. (Ohio) R. 205.

⁷ Co. Lit. 44 a, 300, 301, 325 b, 341 b, 342 a, 346 a, b; Plowd. 199; Dyer, 40, pl. 1, 97, pl. 45; Godbolt, 211; 1 Kyd on Corp. 108, 109, 110, 114, 115, 116.

⁸ Jackson v. Brown, 5 Wend. (N. Y.) R. 590; Gorden v. Preston, 1 Watts, (Penn.) R. 385.

⁹ State v. Bank of Maryland, 6 Gill. & Johns. (Md.) R. 205; Union Bank of Tennessee v. Elliott et al., 6 Gill. & Johns. (Md.) 363; Warner v. Mower et al. 11 Vermont R. 385; Pope v. Stewart, 2 Stewart, (Ala.) R. 401; Binney's case, 2 Bland, (Md.) Chan. R. 142; Lennox et al. v. Roberts, 2 Wheat. R. 373.

even the priority of the State.¹ This right of assignment is not affected by a provision in the charter, that the stockholders shall be individually liable for the corporate debts.²

§ 10. In general, corporations must take and convey their lands and other property, in the same manner as individuals ; the laws relating to the transfer of property being equally applicable to both. As we shall consider in the next chapter but one³ the kinds of deeds by which they may convey their lands, and how they are executed, we refer the reader thither for these heads.

It is, however, perfectly competent to the legislative power, to confer upon corporations the privilege of taking and conveying lands or other property, in such manner as may be thought most expedient ; and a class of corporations, or *quasi* corporations, has grown up in New England out of the circumstances attending the settlement of the country, called Proprietors of common and undivided lands, which had, and in early times ordinarily exercised the power of dividing amongst their members, and conveying to others their lands by *vote*. As these corporations are somewhat peculiar, and as through them this portion of the country was chiefly divided and settled, and upon their proceedings almost all our land titles ultimately rest, it may not be inappropriate for us to bring their origin, organization, and the legal effect of their doings into one view, instead of scattering our remarks upon them through the whole volume. We have therefore made them the subject of a separate chapter, to which we would refer the reader.⁴

§ 11. 1. If any portion of the members of a corporation secede, and are even erected into a new corporation, the corporate property will not be transferred or distributed in consequence of the separation, but will remain with the old corporation, unless

¹ State v. Bank of Maryland, 6 Gill & Johns. (Md.) R. 205.

² Pope v. Brandon, 2 Stewart, (Ala.) R. 401.

³ Chap. VII.

⁴ Chap. VI.

indeed there be an agreement made for the partition of it.¹ And if a religious society purchase lands, a majority of them have a right to control their use and occupation, notwithstanding any supposed error in doctrine, shown to be a departure from the belief of the majority at the time of the purchase.²

2. At common law, upon the dissolution, or civil death of a corporation, all its real estate, remaining unsold, reverts back to the original grantor or his heirs ;³ for, says Coke, "in the case of a body politique or incorporate, the fee-simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift or grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth."⁴ The grant is indeed only during the life of the corporation, which may endure forever ; but when the life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in case of every other grant for life.⁵ In such an event the personal property of the corporation in England vests in the king,⁶ and in this country, in the people, as succeeding to his right and prerogative,⁷ and the debts due to and from the corporation are extinguished.⁸ Every

¹ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Brown v. Porter*, 10 Mass. R. 93; *Baker, et al. v. Fales*, 16 Mass. R. 488; *North Hempstead v. Hempstead*, 2 Wendell, (N. Y.) R. 135, per Savage, Ch. J.; and see *The Inh. of Harrison v. The Inh. of Bridgeton*, 16 Mass. R. 16; *The Inh. of County of Hampshire v. The Inh. of County of Franklin*, 16 Mass. R. 76; *Smith v. Smith*, 3 Dessaus. (S. C.) Chan. R. 557.

² *Keyser et al. v. Stanisfer et al.*, 6 Ohio R. 363.

³ Co. Lit. 13 b; *Edmunds v. Brown & Sillard*, 1 Lev. 237; *Pollexfen, Arg. Quo. War.* 112; *Attorney General v. Ld. Gower*, 9 Mod. 226; *Colchester v. Seaber*, 3 Burr. R. 1868, Arg.; *Rex v. Passmore*, 3 Term. R. 199; 1 Black. Comm. 484; 2 Kyd on Corp. 516; *Hooker v. Utica, Turnp. Company*, 12 Wend. (N. Y.) R. 371; *State Bank v. State*, 1 Black. (Ind.) R. 267; 2 Kent, Comm. 246; *Folger v. Chase*, 18 Pick. (Mass.) R. 66.

⁴ Co. Lit. 13 b.

⁵ 1 Black. Comm. 484.

⁶ Authorities above.

⁷ 2 Kent, Comm. 247, and see above.

⁸ *Ibid*; *McLaren v. Pennington*, 1 Paige, (N. Y.) Chan. R. 111.

creditor of a corporation contracts with reference to this contingency, and the existence of a private contract cannot force a perpetual existence upon such a body contrary to public policy.¹

A merger, by act of the legislature, of the rights of an old corporation in a new one is not, however, such a dissolution of a corporation, as that the real estate of the old corporation reverts to the grantees.² These consequences of dissolution upon the property of a corporation are usually averted by some provision in the charter, or by statutes general or special.³ And when the legislature proceeds under a general statute to wind up the concerns of a bank, those provisions, calculated to apprise all interested of the fundamental changes going on in the institution, must be complied with, in order to give legal efficacy to the acts done under such statute; and, if they are not complied with, the corporation will not be divested of its property, and the existence of its charter will not be thereby terminated.⁴ That clause of the Constitution of Indiana, which provides "that no man's property shall be taken for public use without the consent of his representatives," does not prohibit a judgment of seizure of corporate franchises in *quo warranto*, nor prevent the common law consequences, upon such a dissolution of a corporation, as to its property.⁵

¹ Authorities above, and *Mumma v. The Potomac Co.*, 8 Peters, 281.

² *Union Canal Co. v. Young et al.*, 1 Whart. (Penn.) R. 410; *Bellows v. Hallowell & Augusta Bank*, 2 Mason, C. C. R. 31; *State Bank of Ind. v. State*, 1 Black. (Ind.) R. 273.

³ 2 Kent, Comm. 247; *McLaren v. Pennington*, 1 Page, (N. Y.) Chan. R. 111. Stat. Mass. 1819, ch. 43, which entitles all corporations of that state to three years from the day of their dissolution to wind up their affairs and divide their stock. Under this statute, it was held, that a bank was authorized, just before the expiration of the three years, to indorse a note to trustees appointed to wind up the affairs of the bank. *Folger v. Chase*, 18 Pick. (Mass.) R. 66.

⁴ *Farmers Bank of Delaware v. Beaston*, 7 Gill & Johns. (Md.) R. 422.

⁵ *State Bank of Indiana v. State*, 1 Black. (Ind.) R. 278.

CHAPTER VI.

OF PROPRIETORS OF COMMON AND UNDIVIDED LANDS.

§ 1. WHEN our ancestors first came to America, it was usual, in some of the New England States, for the legislatures to grant a township of land to a certain number of proprietors, as grantees in fee, to hold as tenants in common; and a great proportion of the lands of Massachusetts and Plymouth colonies were originally granted by the colonial legislatures in this way.¹ Much larger tracts in Massachusetts under grants from the Council at Plymouth, in England, from the General Courts of the colonies of Massachusetts and Plymouth, and from the Indians, were claimed by proprietors; the Kennebeck proprietors claiming about three millions of acres; the Pejepscot proprietors about as many more; the Waldo proprietors about a million of acres; the Pemaquid proprietors about ninety thousand acres; and upon settlement of rights and boundaries with the State, these proprietors retained nearly one half of what they thus claimed and held.² Other large tracts were also held and claimed under Indian titles, recognised by the legislatures.³ In Rhode Island, which was originally settled by persons persecuted from other colonies, and who had at first no charter of government, the proprietors acquired their lands wholly by purchases from the Indians, subsequently confirmed by the General Assembly organized under the charter of

¹ 2 Dane, Abr. 698.

² 4 Dane, Abr. 70; Sullivan on Land Titles, 39, 40, 44 to 48.

³ Sullivan on Land Titles, 40 to 46. The letter of Governor Winslow, of the Plymouth Colony, of the 1st of May, 1676, states, that before King Philip's war, the English did not possess one foot of land in that colony, but what was fairly obtained, by honest purchase, from the Indian proprietors, with the knowledge and allowance of the General Court. Hazard's Collection of State Papers, vol. 2, p. 531 to 534; Holmes's Annals, vol. 1, p. 383; 3 Kent, Comm. 391.

Charles II.¹ Thus, in almost every town in New England, there was a body of proprietors, distinguished from those inhabitants, who had no interest in the grants and purchases referred to. As, in early times, the lands were of little money value, this latter class of inhabitants formed a very insignificant number; so that a town, and proprietors meeting would be composed of nearly the same individuals. Hence, it is by no means uncommon, in the earlier records, to find the doings of the towns and proprietors confounded; the same clerk usually acting for both, and attribu-

¹ See Preamble and Act of 1682; R. Island Laws, Dig. 1730, p. 30, 31. In speaking of Rhode Island in this connexion, we exclude those portions of the State over which Massachusetts and Plymouth Colonies, — and when united, — the Province of Massachusetts Bay, once exercised jurisdiction. Upon settlement of the boundary line of Rhode Island on the east, and by concession on the part of Massachusetts on the north, the former State became possessed, and for the first time, of much of the territory included within her chartered limits; whereupon, by act of the General Assembly of Rhode Island in 1746, the grants made by the late Colonies of New Plymouth and Massachusetts, or the Province of Massachusetts Bay, were confirmed. The title to the Providence Purchase originated in a deed from Canonicus and Miantinomo, uncle and nephew, Narragansett Sachems, to Roger Williams, of "all the lands and meadows on the two fresh rivers, the Moshasuck and the Woonasquetucket;" the same lands being more definitely bounded in a subsequent deed from the same Sachems to the Founder of Rhode Island. Between 1636 and 1638, Roger Williams, by a deed which has been lost, communicated his title thus acquired to his twelve associates, thereby giving "equal right and power of enjoying and disposing of the same grounds and lands" to his friends, the said associates, "and such others as the major of us shall admit into the same fellowship of vote with us." This was the commencement of the Proprietors of the Providence Purchase, whose very title contemplates that it was to be shared with those who might settle in the colony, and who, from that time forward, always acted as if incorporated, disposing of their lands in the same way they transacted their town business, by mere vote. The evidence of the original "*twelve mens deed*," as it is commonly called, is found in a subsequent deed from Roger Williams to the same effect, (though very much and very interestingly expanded by a complete history of the circumstances attending the settlement and purchase,) and in a memorandum concerning the lost deed left by him. All the land titles in the Providence Purchase rest on this foundation, supported by the Charter of Charles II., and the act of 1682.

ting to the one body the appropriate transactions of the other.¹ It was early found that the proprietors, in many cases, were too numerous and dispersed to manage their lands as individuals; since, without incorporation, they could never, as a body, legally act even by majorities, so as to bind their dissenting associates; nor make a lease or sale of their lands, without the concurrence of every proprietor in the execution of the deed.² Accordingly, in the old digests of all the New England colonies, acts are found prescribing the mode in which their meetings shall be called, and empowering them to choose officers,—pass orders relative to the management, division, and disposal of their common lands,—and in some of the colonies to assess and collect taxes from their members; in short, communicating to them all the incidents of a corporation aggregate, without giving them that name.³ In some

¹ 2 Dane, Abr. 698. This confusion is found in the early records of Providence, R. I.; the records of both town and proprietors being kept in the same book until 1717—18.

² In Rhode Island, and not improbably in some of the other States, before any act was passed enabling them so to do, and in fact whilst the settlements themselves were acting under a voluntary compact of government merely, the proprietors were accustomed to assemble and pass votes and orders relative to their common property, in the same manner as if incorporated; admitting members into the propriety, upon payment of a certain sum towards the common stock, by mere vote; and in the same simple way, from time to time, dividing their lands amongst those entitled, according to their rights. As all the colonists were alike interested in the validity of such proceedings, there was then probably as little danger of their being impeached, as there would be at the present day of interference with a *squatter* in the western country, when bidding at a public sale for government lands which he had occupied without title. A similar course was taken in the colony of New Plymouth while under their famous compact. See Laws of the Col. of New Plymouth, 29, and onwards.

³ 4 Dane, Abr. 70, 71, 72, and Sullivan on land titles, 122, 123, for Mass. Acts, being Acts of 1636, 1692, 1712, 1735, 1741, 1753, 1783. Laws of the Colony of New Plymouth, 197, 198, 223; Inhab. of Springfield v. Miller, 12 Mass. R. 415; Thorndike v. Barrett, 3 Greenl. (Me.) R. 380; Thorndike v. Richards, 1 Shepley, (Me.) R. 430; Coburn v. Ellenwood, 4 New Hamp. R. 99; Farrar v. Perley, 7 Greenl. (Me.) R. 404; Woodbridge v. Proprietors of Addison, 6 Vermont R. 204, 206; Stiles v. Curtis, 4 Day, (Conn.) R. 328; Laws R. I. Dig. 1730, p. 30, 31.

of the colonies, these powers were granted to them, one by one, in successive statutes ; and in others, at once, by a single act of legislation. As the proprietors sold and set off their lands in severalty, they remained proprietors in common, only of the residue ; until at last, in some of the towns of the earlier settled states, there is a small portion only of such lands left, and in most of them, none at all. In some of the States, they have therefore become obsolete for want of something to act upon ; their lands being all sold or divided, and settled ; and their former existence is known only by tradition, and by their records, to be found in the public offices, or in the hands of some " Proprietor's Secretary " of antiquarian taste, who since his appointment has never been troubled with any proceedings on the part of his constituents. In other States, they remain in the exercise of their powers to the present day, — some newly organized, and almost all having yet something to do ; but it requires not prophecy to foretell, that the fast and far spreading settlements of our country, will soon gather in the last of this early growth of corporations in the soil of New England.

§ 2. By the acts before referred to, it will be found that proprietors meetings were called by a warrant or order, issued at the request of some, or a specified number of the proprietors, by a magistrate, as a justice of the peace, the warrant, we believe, in all the colonies, being required to set forth the occasion of the meeting. When met, the proprietors were also empowered to choose a clerk, surveyors, and other officers, who, in some of the colonies were required to be sworn. They could not legally act upon the business of the propriety, unless at a meeting warned according to the statute enabling them to assemble in a corporate character.¹ But, though the vote of proprietors appointing an agent for a special purpose may not, for such a cause, be legal when passed ; yet, if the proprietors acquiesce in the appointment, receive the benefit of his transactions, knowing that he acted for them, and take no measures to show their dissent to his proceedings, they so far ratify his doings, that they will be as binding

¹ Woodbridge v. Proprietors of Addison, 6 Vermont R. 204, 206.

upon them, as if he had been legally appointed.¹ In a suit brought by the proprietors themselves, they were required to prove the warrant of the justice calling a meeting only *twenty* years before, for the purpose of reorganizing the propriety;² but not to prove a warrant for calling a first meeting held *seventy* years before.³ And after the lapse of forty years, and long exercise of corporate rights, a regular warrant calling the first meeting may well be presumed.⁴ Thus, where persons assumed to act as a propriety more than forty years ago, and having accomplished the purpose of their association, had ceased for more than thirty years to act in that character, it was held, that a stranger, as one claiming under a residuary devisee of a proprietor, could not dispute their capacity thus to associate, nor controvert rights derived from and held under them.⁵ Copies of ancient proprietary grants are admissible in evidence, without proof that the meetings at which they were made were legally assembled.⁶ If the records of a proprietors meeting state it was legally warned and held, this has been deemed *prima facie* evidence of the fact,⁷ and that the articles of business acted upon at such meeting were inserted in the warrant.⁸ In Maine it has been decided, that a first meeting of a propriety of that state will not be treated as illegal and void, because called by the magistrate to be held in New Hampshire, in which State the proprietors resided, no place of meeting being prescribed in the statute.⁹

The records and certificates of the records of proprietors, with regard to the partition and transfer of their common lands, must be, and are continually received as evidence; and their

¹ Woodbridge v. Proprietors of Addison, 6 Vermont R. 204; Abbot v. Mills, 3 Vermont R. 528.

² Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. R. 159.

³ Ibid.

⁴ Copp v. Lamb, 3 Fairf. (Me.) R. 312; Pitts v. Temple, 2 Mass. R. 538.

⁵ Copp v. Lamb, 3 Fairf. (Me.) R. 312.

⁶ Pitts v. Temple, 2 Mass. R. 538.

⁷ Stedman v. Putney, N. Chip. (Vt.) R. 11; Codman et al. v. Winslow, 10 Mass. R. 150, 151.

⁸ Doe v. Lawrence, 1 Chip. (Vt.) R. 103.

⁹ Copp v. Lamb, 3 Fairf. (Me.) R. 312.

practice for a number of years is in itself proof of their agreement and consent, in a particular mode of conducting their business, which, if not illegal, or so uncertain as to be utterly void, must be considered as settled by the will of all concerned.¹ As we have before remarked, in ancient times the affairs of the towns, and of the proprietries within them, were not always kept distinct. Where this has been shown to be the case, a proprietary grant, voted by the town and attested by the proprietary clerk, and also very ancient grants voted by the proprietors in their own name, and even in the name of the town, and attested by the town clerk, have been admitted in evidence.²

A book of proprietors records, which had been in the possession of the grandfather of the witness who produced it, and for thirty years in the hands of the grandfather's executor, from whom it came to the witness, was admitted in evidence, there being no proof that the propriety was still in existence with a clerk to keep their records, and no place appointed by law for the deposit of them.³ In Vermont, the records of the proprietors clerk, of deeds made and recorded prior to the statute of 1783, authorizing such clerks to record deeds, are not evidence of title to the lands therein described.⁴ If a record in the proprietors book be a distinct record of a vote at a regular meeting, granting to one of their number a parcel of the common land to be held in severalty, and locating and describing it by definite and intelligible terms, the plain import of such a vote cannot be controverted by parol evidence.⁵ But if the entry be not a record of the vote of the proprietors, but may be the act of the proprietors, or of the clerk or other officer, the book being ambiguous in this respect, parol evidence is admissible to show with what intent the entry was made.⁶ Thus a proprietors clerk was admitted to testify, from his knowledge of the mode in which the records of the propriety were kept, and in which the propriety conducted

¹ *Codman v. Winslow*, 10 Mass. R. 150, 151, per Sewall J.

² 2 Dane's Abr. 695.

³ *Tolman v. Emerson*, 4 Pick. (Mass.) R. 160.

⁴ *Hart v. Gage*, 6 Vt. R. 170.

⁵ *Williams v. Ingell*, 21 Pick. (Mass.) R. 288.

⁶ *Ibid.*

its business, whether an ancient vote appearing in the records was intended as a definitive grant, or whether something farther, as the action of a locating committee, and their report locating and confirming the grant and recorded in the book of locations, ought not to appear before the records could be said to afford evidence of a complete title.¹

§ 3. In some of the earlier colonial statutes the provisions, enabling the proprietors to act in a corporate character in relation to their common lands, are very general. One of them, after reciting in the preamble "that no order hath bine yett made for their orderly meeting together to devide the said lands, or to make orders for the settlement of the same," empowers them "*to come together att the same certain time and place to transact such matters as may concern them, and what shall be lawfully acted att such meeting by the proprietors, or the major pte of them shall be vallid and binding.*"² Another, after reciting that "there is considerable of lands lying yet uncommon and undivided," "for the more orderly way and manner of the several proprietors, their managing the prudential affairs thereof, and for the more effectual making of just and equal decision or divisions of the same, so that each and every of the proprietors may have their true and equal part or proportion of land, according to his or their proportion of right, and that the exact boundaries of each and every man's allotments, when laid to him, may be held *in perpetuam*," provides, for the calling of meetings and the election of officers, "*for the orderly carrying on and management of the whole affairs of such community.*"³ In other statutes the language used is more precise, the proprietors being empowered "*to order, manage, improve, divide, and dispose of their common lands, in such way and manner as shall be agreed on by the major part of the interested present at a legal meeting, the votes to be collected and accounted according to interest.*"⁴

¹ Ibid.

² Laws of the Colony of Plymouth, 198, Brigham's edit.

³ Laws of R. I. Dig. 1730, pages 30, 31.

⁴ 4 Dane's Abr. 70, 71, 72; Inhab. of Springfield v. Miller, 12 Mass. R. 415; Thorndike v. Barrett, 3 Greenl. (Me.) R. 380; Thorndike v. Richards,

There is certainly nothing in this language taken by itself, which, at the present day, would be construed to authorize a corporation to divide or convey its real estate, in a manner different from that established by the general law. On the contrary the Plymouth statute expressly, and the rest by natural implication, recognise those acts of the proprietors only to be valid, which are *lawfully* done. It should be recollected, however, that some of these statutes were undoubtedly passed in reference to, and with a view to legalize the doings of proprietors already in the practice of assembling and acting as if incorporated, in the management and disposition of their common lands; the proprietors or settlers having in Plymouth and Rhode Island at least, without legal warrant, under voluntary compacts, and from the very necessity of their condition, assumed the power of self-government, and of disposing of their land, in the same manner as they transacted their other common business by vote, as if in the exercise of sovereign power. In the other colonies, as we have before noticed, from the fact, that the same individuals composed both the inhabitants of the towns and the members of the propriety, the doings of these different bodies were frequently confounded; and at all events, it was natural that the mode of transacting their town business, which was by vote, should be adopted in those simple times with regard to the disposition of their lands; especially when we consider the great extent and little value of their possessions, and the frequent divisions to settlers, which were to be made, rendering formal conveyances on each occasion inconvenient and expensive. Construing these statutes therefore in reference to the condition and well known practices of the proprietors, they would seem fairly to authorize the modes of conveyance and division adopted by these bodies. These varied in the different, and even in the same proprieties.

Without doubt, a proprietary conveyance by vote alone, definitely describing the lot sold or set off, is sufficient.¹ A

¹ Shepley, (Me.) R. 430; Coburn v. Ellenwood, 4 New Hamp. R. 99; Woodbridge v. Proprietors of Addison, 6 Vermont R. 204.

¹ Williams v. Ingell, 21 Pick. (Mass.) R. 288.

common mode of partition was for the proprietors to vote, that there should be a new division of their common lands, so many acres to each full right, and in the same proportion to each part-right ; to be taken up after a specified time. Each proprietor was thereupon entitled to call upon the surveyor to make for him a survey of so much of the common land, selected at the pleasure of the proprietors, to which the vote of partition applied, as his right entitled him to ; the survey was then, to avoid all collision, taken to a standing committee of the proprietors for allowance, and if by them allowed, was by the clerk recorded, and thus the title in severalty became complete. Another mode was for a committee, appointed for the purpose, to bound out the tract intended to be divided, and to divide the same into as many equal parcels, having regard both to quantity and quality, as there were proprietors, and to return a plat of the same to the proprietors, on which each lot was marked out and numbered. At their meeting, the proprietors after considering the plat and accepting it, if there was no objection to it sustainable, would vote that they proceed to draw for the lots thus marked and numbered. The draft was then made, and the number drawn by each was recorded, and the name of each proprietor written on that lot on the plat, which answered to the number he had drawn, and this finished the operation.

§ 4. The practice of making partition of their lands amongst proprietors, by vote merely, prevailed in all the proprietries ; an immense amount of property eventually depended upon the validity of these proceedings, and they have always been sustained by the courts of every one of the New England States.¹ After the proprietors have made a division of certain lots by drafts, they cannot rescind such a partition and vote lots thus set off to per-

¹ *Adams v. Frothingham*, 3 Mass. R. 360 ; *Codman v. Winslow*, 10 Mass. R. 146 ; *Baker v. Fales*, 16 Mass. R. 497 ; *Inh. of Springfield v. Miller*, 12 Mass. R. 415 ; *Folger v. Mitchell*, 3 Pick. (Mass.) R. 306 ; *Coburn v. Ellenwood*, 4 New Hamp. R. 99 ; *Abbot v. Mills*, 3 Vermont R. 280 ; *Woodbridge v. Proprietors of Addison*, 6 Vermont R. 206 ; *Thorndike v. Barrett*, 3 Greenl. (Me.) R. 380 ; *Same v. Richards*, 1 Shepley, (Me.) R. 430 ; *Pike v. Dyke*, 2 Greenl. (Me.) R. 213 ; *Stiles v. Curtis*, 4 Day, (Conn.) R. 328.

sons claiming the different rights, in lieu of their drafts.¹ But where the proprietors, after having laid out a parcel of land to one of their number, and neither he nor his heirs having entered, voted, that the location should be void, and that his heirs should take a new survey, and laid out the same land to another, it was held, that a stranger could not contest the validity of this rescission and relay.² And where the plaintiff and defendant in ejectment both claim under the same proprietary division, the defendant cannot dispute the legality of the proprietary proceedings in making the division.³ Proprietors may arrange themselves in classes, and divide their lands by lot, an equal parcel to each class, to be held by the individuals of that class in common, to the exclusion of the rest; and if preparatory to a partition they appoint a committee to survey a tract of land, and lay it out in lots, they may either assent to the doings of such a committee, or make partition without regard to them; so that if a part only of the committee act, and the proprietors ratify their acts, and make partition accordingly, the proceedings are valid.⁴

The power of the propriety, to make partition of the common lands amongst the proprietors, does not exclude the right of the proprietors, as tenants in common, to have partition by process of law against their associates; but the proprietors are under no obligation to suspend their proceedings in dividing their lands, to enable one of their number to obtain partition by process of law; and, notwithstanding the pendency of such a suit, their voluntary partition will be valid and binding, provided the suit does not go to judgment.⁵

§ 5. It was no uncommon thing for proprietors to set apart by

¹ *Smith v. Meacham*, 1 Chip. (Vt.) R. 424.

² *Davis v. Mason*, 4 Pick. (Mass.) R. 156.

³ *Bown v. Bean*, 1 Chip. (Vt.) R. 177; *Bush v. Whitney*, 1 Chip. (Vt.) R. 369.

⁴ *Folger v. Mitchell*, 3 Pick. (Mass.) R. 396.

⁵ *Mitchell v. Starbuck et al.*, 10 Mass. R. 20; *Oxnard et al. v. Kennebeck Proprietors*, 10 Mass. R. 179; *Chamberlain v. Bussey*, 5 Greenl. (Me.) R. 171; *Folger v. Mitchell*, 3 Pick. (Mass.) R. 396; *Williams College v. Mallett*, 3 Fairf. (Me.) R. 401.

vote a lot or tract of land for public or pious uses, as for a training field, a public square or common, for public buildings, or a meeting-house.¹ Where land is thus dedicated for a public square or common, and individuals purchase lots bordering thereon, under an expectation, excited by the proprietors, that it shall so remain, the proprietors cannot resume the land thus dedicated, and appropriate it to another use;² nor can the town reclaim land, thus set apart and used by the public for a number of years, or convey a right to the exclusive possession of any part of it.³ The public, in such a case, have only an easement in the land, and any *proprietor* of the undivided lands in the town may, it seems, maintain ejectment against one who is in the exclusive possession of land thus set apart.⁴ But where the proprietors of a town, having set apart a piece of land as a common for public uses, made a division of lands consisting of one acre lots about the common, which were distributed to the proprietors, one to each right; it was held, that a *purchaser* of one of these lots had no right to the fee of the common in front of it, and could not maintain trespass against one, who had erected a building thereon near his lot.⁵ The proprietors of a township appropriated land for a meeting-house, which was subsequently built thereon; the town was afterwards incorporated, and assumed the charge of all parochial matters, and the land around the meeting-house was called "the common, &c.," and was always open, was intersected by roads, and used for the site of horse sheds, and for all the ordinary purposes incident to a place of worship, and also for a training field, and the first parish in the town, as the successor of the town in its parochial character, and in actual possession, maintained trespass against a mere stranger for ploughing up a portion of the land thus appropriated, though

¹ *Wellington v. Petitioners*, 16 Pick. (Mass.) R. 98.

² *Abbot v. Mills*, 3 Vermont R. 521; *Emerson v. Wiley*, 10 Pick. (Mass.) R. 310.

³ *Pomeroy v. Mills*, 3 Vermont R. 279; *State v. Trask*, 6 Vermont R. 355; *Stiles v. Curtis*, 4 Day, (Conn.) R. 328; *Mayo v. Murchie*, 3 Munf. (Virg.) R. 358.

⁴ *Pomeroy v. Mills*, 3 Vermont R. 279.

⁵ *Ferre v. Doty*, 2 Vermont R. 378.

after the appropriation the proprietors had voted to sell a part of it, and had exercised other acts of ownership over other portions of it.¹

§ 6. There never was a question but that proprietors were authorized to sell portions of their common lands, as a corporation, to one not a member of the propriety, and *a fortiori* to one who was, for the purpose of defraying their incidental expenses, and bringing forward, settling, and improving their other lands.² In some of the proprieties it was usual when a half or quarter-right-man, as he was called in distinction from a proprietor entitled to a full right, had, in a division by drafts, drawn a particular lot to a part of which only he was entitled according to right, to give him a right of pre-emption to the remainder of the lot, the proceeds of the sale going into the common stock.³ Neither can there be any doubt but that a deed, signed and acknowledged on behalf of the corporation, by the clerk or other agent duly authorized by vote, with the corporate seal attached, would be a competent and very proper mode of conveying lands on the part of the propriety in case of a sale; and in modern times, this mode is frequently, if not usually adopted.⁴ A vote of proprietors, authorizing a committee to sell the common lands, empowers them also to make deeds in the name of the propriety; and in executing such deeds one seal is sufficient, though the committee may consist of several persons.⁵ But where proprietors authorized their clerk to make a deed of a piece of their land to an individual in their name, as clerk, it was decided that the grantee took no title.⁶ In Maine, however, a similar deed, executed by the clerk, under a vote directing him to convey "agreeably to the usual forms in like cases practised," was sustained, on the ground, that, by a general order of the pro-

¹ First Parish in Shrewsbury v. Smith, 14 Pick. (Mass.) R. 297.

² 4 Dane, Abr. 120.

³ This was the custom amongst the Proprietors of the Providence Purchase in Rhode Island.

⁴ Coburn v. Ellenwood, 4 New Hamp. R. 99.

⁵ Decker v. Freeman, 3 Greenl. (Me.) R. 338.

⁶ Coburn v. Ellenwood, 4 New Hamp. R. 99.

prietors, the form of the proprietary deeds was to be such "as the standing committee should judge necessary," for the purpose of granting and conveying the lands of the company, "to be approved of by at least two of the committee, and expressed on the same in writing under their hands;" and that, as the deed in question was thus approved, and conformed "to the usual forms, in like cases practised," it was good; proprietors being empowered to prescribe the forms of their conveyances.¹ It is not necessary that deeds, made by proprietors committees, should contain recitals of their authority and proceedings in the sale; such recitals not being evidence of the facts.²

It was long a question, whether proprietors could sell their common lands, merely for the purpose of turning them into money. It being found, however, that the practice had been general, and that large estates were held under such sales, the courts affirmed this practical construction of the statutes, enabling proprietors "to manage, divide, and dispose of their lands, in such way and manner as hath been or shall be concluded and agreed on by the major part of the interested;" and decided in favor of such sales.³

A much more serious doubt once entertained was, whether proprieties could by mere vote, without deed, or even location, convey their lands to one not a member of the propriety; and it was remarked by an American writer on Land Titles, in the beginning of this century, that such a grant "of any part of them by the voice of the majority, to the disinberison of the proprietor of such part, or a grant by the vote of all the proprietors, to convey the whole, *without deeds in legal form*, cannot, from any precedent yet established, be justified."⁴

There were, however, some instances, previous to that time, where, without objection and solemn argument, the Supreme Court

¹ Thorndike v. Barrett, 3 Greenl. (Me.) R. 380.

² Inman v. Jackson, 4 Greenl. (Me.) R. 237; Powell v. Brown, 1 Tyler, (Vt.) R. 286.

³ 4 Dane, Abr. 120; Rogers v. Goodwin, 2 Mass. R. 475; Commonwealth v. Pejepscot Proprietors, 7 Mass. R. 399.

⁴ Sullivan on Land Titles, 123.

of Massachusetts allowed such votes of land to strangers to have the same effect against co-tenants, as deeds of bargain and sale from one individual to another would have had.¹ When, however, the question came directly before the courts for decision, so many and so large estates were found to depend upon the validity of this mode of conveyance, and so long had been the period during which it had been used, that the use was regarded as a practical construction of that portion of the statutes, which empowers proprietors to manage and “dispose of their lands *in such a way and manner* as shall be agreed by the major part, &c. ;” and such conveyances were held good.² It will be found that the earlier cases speak as if possession must accompany such a grant, and, though they affirm the ancient doings of the proprietors of this sort, express doubts, whether such a proprietary conveyance made at the present day would be supported.³ We do not well see, however, with what consistency a different construction can be given to the same words in a statute, according as the transaction to which they are applied is new or old ; the statute itself intimating no such difference. As proprietors could in this way convey a definite portion of their land, so they could convey an undivided interest in their common lands in the same way. In early times this was very common, upon payment of so much money into the common stock, and was sometimes done in recompense of important services.⁴ A grant of land made by vote of proprietors can no more be rescinded by a subsequent vote, even at an adjournment of the meeting, at which such vote was passed, than if made by deed ;⁵ and the exhibition of the first vote, as the ground of his

¹ Ibid. 123.

² *Adams v. Frothingham*, 3 Mass. R. 360 ; *Codman v. Winslow*, 10 Mass. R. 150, 151 ; *Inhab. of Springfield v. Miller*, 12 Mass. R. 415 ; *Baker v. Fales*, 16 Mass. R. 497 ; *Inhab. of Rehoboth v. Hunt*, 18 Mass. R. 224 ; *Thorndike v. Barrett*, 3 Greenl. (Me.) R. 380 ; *Thorndike v. Richards*, 1 Shepley, (Me.) R. 430 ; *Coburn v. Ellenwood*, 4 New Hamp. R. 99.

³ Same Authorities.

⁴ Dr. John Clarke, of Newport, R. I., is said to have been voted in a proprietor of the Providence Purchase for his distinguished services in procuring the charter of the Colony of Rhode Island from King Charles II.

⁵ *Rehoboth v. Hunt*, 1 Pick. (Mass.) R. 224 ; *Shapleigh v. Pilsbury*, 1 Greenl. (Me.) R. 271 ; *Pike v. Dyke*, 2 Greenl. (Me.) R. 213.

title, by no means precludes the grantee from objecting to the subsequent proceedings of the proprietors in vacating it.¹

§ 7. The form of proprietary votes intended to operate as grants, and the ceremonies attending them in order to their completeness, vary in the different proprietries; each, as we have seen, by the construction put upon the enabling acts, being entitled to adopt its own mode of disposing of its common lands.² In some it was by mere vote; in others by a vote, followed up by a location and survey allowed by a committee, and recorded upon such allowance by the clerk.³ In the great Kennebeck Purchase the mode of conveyance is for the proprietors "to vote, grant, and assign" the land specified in the vote to A. B., &c.; whereupon the clerk gives the purchaser an instrument in the nature of a certificate of the vote, and in some degree resembling a deed; being under the seal of the corporation, signed by the clerk, and by him acknowledged before a justice of the peace.⁴

The most liberal construction has always been given to ancient proprietary grants, in order to carry into effect the intent of the parties; the courts taking into view the customs, usages, and probably the want of legal learning amongst the early settlers. Technical rules of conveyancing are not strictly applied to votes and grants of this character; and estates in fee-simple have passed without any words of limitation in the vote, because it was apparent, that the corporation meant to part with all their interest in the granted premises.⁵ A vote, merely authorizing the clerk to convey, is not, however, a conveyance by vote, but in order to be effectual, must be followed up by a proper deed.⁶ Where

¹ *Pike v. Dyke*, 2 Greenl. (Me.) R. 213.

² *Thorndike v. Barrett*, 3 Greenl. (Me.) R. 385, 386, per Mellen C. J.

³ *Adams v. Frothingham*, 3 Mass. R. 360; *Williams v. Ingell*, 21 Pick. (Mass.) R. 288.

⁴ *Thorndike v. Barrett*, 3 Greenl. (Me.) R. 385, 386.

⁵ *Baker v. Fales*, 16 Mass. R. 497; *Inhab. of Worcester v. Green*, 2 Pick. (Mass.) R. 428, 429; *Stoughton v. Bates*, 4 Mass. R. 528.

⁶ *Thorndike v. Richards*, 1 Shepley, (Me.) R. 430; *Coburn v. Ellenwood*, 4 New Hamp. R. 99.

proprietors voted that "the income" of a piece of their land should be devoted to the support of a school in the town where it lay, the land to be leased from time to time by the selectmen of the town; this was considered to be a grant, so that the proprietors could not rescind it.¹ A vote granting merely "the herbage or feeding of land" does not pass the soil, so that the grantee can maintain a writ of entry against the grantor, or those claiming under a subsequent grant of the soil.² Nor does a vote "that an hundred acres of the poorest land, &c. be left common for the use of the town for building stones," convey the land to the town, but merely the particular use named.³ And where proprietors voted that "at the request of A. B. is granted to the right of C. D. half an acre in the ten acre division," and it appeared from the proprietors book of locations that no location had been made to A. B, and he was aided by no occupancy or possession, the court considered that he could take no benefit from this vote, without proof that he derived some title from C. D.⁴

§ 8. Proprietors have usually, by express enactment, power to raise money by tax, to be assessed on their several rights, in due proportion, for the purpose of bringing forward and settling their lands, and to defray the incidental expenses of the propriety; and when such assessments were not paid after certain periods, and certain notices had been given, and advertisements published, directed by the act, a committee, or the collector of the tax, were empowered, from time to time, to sell at public auction so much of the delinquent proprietor's right or share in the common lands, as would be sufficient to pay the tax, &c.⁵ In Maine, it has been decided that the Massachusetts Provincial act of Geo. 2, c. 2, which authorized the sale of delinquent proprietors lands after *thirty* days' notice, was not repealed by the act of 26

¹ *Rehoboth and Seekonk v. Hunt*, 1 Pick. (Mass.) R. 224.

² *Ibid.*

³ *Worcester v. Green*, 2 Pick. (Mass.) R. 428, 429.

⁴ *Williams v. Ingell*, 21 Pick. (Mass.) R. 288.

⁵ *Dane*, Abr. 71, 72; *Bott v. Perley*, 11 Mass. R. 175; *Farrar v. Perley*, 7 Greenl. (Me.) R. 404; *Wentworth v. Allen*, 1 Tyler, (Vt.) R. 226.

Geo. 2, c. 2, which required a delay of six and twelve months, and a subsequent notice of forty days ; the former statute applying to grants made by the General Court, and being confined to sums raised on lands granted on conditions not fulfilled, and the latter relating to all lands "lying within no township or precinct, which are owned by a considerable number of proprietors," without regard to the source from which the title to such lands was derived.¹ The forty days' notice required by the latter of these statutes, and the sixty days' similar notice required by Provincial act 2 Geo. 3, to be given before the sale of such proprietors' lands, are to be computed after the expiration of the respective periods of three, six, and twelve months, mentioned in these statutes.² The forty days' notice required by the statute 26 Geo. 2, must be given before the collector can sell for the non-payment of taxes ; and his deed executed before the forty days had elapsed was held to pass no title.³ Where, as is, we believe, universally the case, it is necessary that the warrant calling the meeting should state the purposes for which it is convened, a vote to raise a certain sum, under an article in the warrant, to raise money for certain purposes, does not exhaust the efficacy of the article, but further sums may be lawfully raised at *adjournments of the same meeting*, until the objects of the proprietors are effected.⁴

A vote of proprietors, "that the collector be empowered to give deeds of lands sold for taxes," can, of course, empower him no farther than to sell the land of delinquent proprietors *in the mode provided by law*.⁵ A collector's deed, in case of sale for taxes, however it may be worded, is not even *prima facie* evidence of a legal sale ; but the delinquency of the proprietor, and that the collector has pursued the authority to sell, given in the statutes, must be independently proved.⁶ The collector need

¹ Farrar v. Perley, 7 Greenl. (Me.) R. 404.

² Innman v. Jackson, 4 Greenl. (Me.) R. 237.

³ Farrar v. Eastman, 1 Fairf. (Me.) R. 191.

⁴ Farrar v. Perley, 7 Greenl. (Me.) R. 404.

⁵ Farrar v. Eastman, 5 Greenl. (Me.) R. 345.

⁶ Powell v. Brown, 1 Tyler, (Vt.) R. 286.

not, in his advertisement of sale, annex to the name of each delinquent proprietor the sum assessed on his right or share, but may mention the amount of the tax on each right generally, and insert a list of the delinquents.¹ These acts enabling proprietors to tax, and sell on non-payment, apply solely to *common and undivided* lands, and never were construed to authorize a sale of lots, severed and appropriated by the votes and proceedings of the corporation to individual proprietors, and much less to lots thus severed, sold by such proprietors to third persons.²

§ 9. As might be inferred from what has preceded in this chapter, proprietors of common and undivided lands, when duly organized, became a corporation, and held their lands as a propriety ; so that, in the assertion of their proprietary rights, the proceedings must be conducted in that corporate name by which they are known and called in their own records.³ The members of the propriety are however, as between themselves, tenants in common, and, as we have seen, entitled to partition by legal process.⁴ Each proprietor may sell and convey the whole, or any portion of his interest or right in the common and undivided lands ; and his grantees become both tenants in common with the other proprietors, and members of the corporation. On the death of a proprietor his heirs or devisees acquire the same rights.⁵

¹ *Wentworth v. Allen*, 1 Tyler, (Vt.) R. 226.

² *Bott v. Perley*, 11 Mass. R. 169.

³ *Chamberlain v. Bussey*, 5 Greenl. (Me.) R. 170.

⁴ *Ibid.* ; *Mitchell v. Starbuck*, 10 Mass. R. 20.

⁵ 2 Dane, Abr. 698.

CHAPTER VII.

OF THE COMMON SEAL, AND OF THE DEEDS OF A CORPORATION.

§ 1. THE practice of using seals for the purpose of giving authenticity to written instruments, is of the highest antiquity. It was known among the Jews,¹ prevailed among the Romans,² and has been diffused through those nations which have adopted the Civil Code, as the rule of their conduct.³ In England, seals were introduced into common use by the Normans at the Conquest;⁴ although they appear to have been known to the Saxons in the time of Edgar; and to have been used by Edward the Confessor after his residence in Normandy.⁵ In those early and illiterate times, the Norman practice of sealing, any more than the ordinary Saxon practice of signing with, or appending to, the instrument impressed on gold or lead the sign of the cross, does not appear to have arisen from any notion of the peculiar solemnity of the seal, but from an incapacity on the part of him, who would concur with the tenor of an instrument, to subscribe his name to it. Caedwalla, a Saxon king, honestly avows this reason at the end of one of his charters; "*propria manu, pro ignorantia literarum, signam sanctae crucis, expressi et subscripsi*;"⁶ and it is evident from ancient French and Norman charters still extant, which, without being signed, bear waxen seals with the name,

¹ Genesis, ch. xxxviii. 18; Esther, ch. viii. 8; Jeremiah, ch. xxxii. 10; Heineccius, 497; 4 Kent, Comm. 445, in notia.

² Inst. 2, 3, 10; Heineccius, 497; and see the learned opinion of Mr. C. J. Kent, in *Warren v. Lynch*, 5 Johns. (N. Y.) R. 247.

³ Heineccius, 497; 2 Black. Comm. 305, 306.

⁴ Mad. Form. Int. 27.

⁵ Co. Litt. 7, a; Seld. Off. Chan. 3, dubitante; Mad. Form. Int. 27; 2 Black. Comm. 305.

⁶ 2 Black. Comm. 305, n. d.

cognizance, or device of the makers impressed upon them.¹ It is probable that the incidence of a common seal to every corporation resulted, either from ignorance of the art of writing on the part of its officers or agents, or from the use of seals established among individuals, and originating in *their* ignorance. Blackstone, indeed, attributes this incident to the peculiar nature of a corporation aggregate. "For," says he, "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."² It was, however, never true, that corporations aggregate could express a corporate assent, only by their common seals. From the earliest times, their assent to by-laws, and in the election of their officers, was expressed by vote. In the same way, it appears to us, they might have chosen special agents for the purpose of binding them by particular contracts; and these being capable "of personal act and oral discourse" were, in the nature of things, no more necessitated to use the corporate seal for the purpose of binding their constituents, within the scope of the authority conferred upon them by vote, than the agent of a natural person would be to use the private seal of his employer, for the same purpose. This, we think, is rendered more clear, by a comparative view of the Civil Law, in the same particular. The Civil Law, in the shape in which we have it, was instituted amongst a people more literate than that which gave origin to the common law. From the *nature* of the corporations or communities existing under it, the same incapability, literally speaking, of personal act or of oral discourse was attached to *them*, as to corporations aggregate at the common law; yet we find that not only did they appoint officers capable of contracting without seal,

¹ 2 Black. Comm. 306.

² 1 Black. Comm. 475.

but themselves contracted directly by vote, without the intervention of any officers whatever.¹ The truth is, that though in its decay the Roman Empire was won back to ignorance by its barbarous invaders,² in its better days, neither individuals nor corporations existing within it were, in general, compelled to use seals by way of signature, from an ignorance of the art of writing. A common seal was not, therefore, necessary to a corporation at the Civil Law, to enable it to make a written contract; and accordingly, Wood tells us of such a corporation, that "it may have a common chest, and *sometimes* a common seal."³

As the art of writing became more common in England, the practice of concurring with the tenor of *every* written instrument by seal, on account of its inconvenience, grew into disuse with individuals, and was confined to those writings of a peculiarly high and solemn kind, which were employed in the transfer of lands, and acts of the like nature. The practice, however, still continued with the old corporations of the common law, perhaps from the natural inflexibility of *bodies* of men, where many wills must concur to a change, and because, owing to the comparative paucity of their contracts, and the number of their agents, the inconvenience of this mode of contracting would be less sensibly felt by them, than by individuals. It is probable that in this way grew up the old rule, so long and so well established in England, that excepting in the administration of its internal affairs, as the election of officers and the like, corporations aggregate could signify their assent only by their common seal, and of course could act and contract, only by deed.

§ 2. This being the rule, it became incident to every corporation of this kind, to have a common or corporate seal,⁴ as the means necessary to enable it to appoint any special agent, except

¹ Ayliffe, Civil Law, B. 2, tit. 35, p. 198.

² 2 Black. Comm. 305, n. d.

³ Wood, Civil Law, ch. 2, p. 135; and see Browne, Civil Law, b. 1st, 104.

⁴ Davie, R. 44, 48; 1 Black. Comm. 475; 1 Kyd on Corporations, 268; 2 Kent, Comm. 224.

of the most inferior kind, or to make any contract whatever.¹ And not only is it incident to every corporation to have a common seal, without any clause in the charter or act of incorporation, expressly empowering it to use one, but it may make or use what seal it will.² Accordingly, it was decided in the reign of Edward III., that if an abbot and convent sealed a writing with the seal of a layman, and it was said in the deed, "in testimony whereof our common seal is affixed," it was sufficient; for they might change their common seal when they would.³ It should be observed, however, that to bind a corporation by deed, the instrument must be sealed with a seal which is theirs, either originally, or by adoption; and hence, that an instrument under the private seals of their authorized agents does not bind the body as a deed, although they may be liable in implied assumpsit for benefits conferred under it.⁴ Where by an act of the legislature the trustees of a gospel lot were declared to be a body corporate, and the act provided that "the said trustees" should have authority to sell the lot, a deed executed by the trustees, as such, and not in the name of the corporation, nor under the corporate seal, was adjudged to be a valid execution of the power, and to vest the title in the grantee.⁵

A deed of proprietary lands, reciting the votes, authorizing the clerk of the proprietors to execute the same, approved by a written endorsement signed by three of a standing committee, two of whom were empowered to approve such deeds as they judged necessary, was, though sealed with the seal of the clerk, held to transfer the title of the proprietors *after thirty years pos-*

¹ The case of the Dean and Chapter of Fernes, Davie, R. 121.

² The case of Sutton's Hospital, 10 Co. 30, b. and see Goddard's Case, 2 Co. R. 5, and Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) R. 417.

³ Ibid. and Perkins' secs. 130, 134.

⁴ Bank of Columbia v. Patterson's Admr. 7 Cranch, 304; Randall v. Van Vechten, 19 Johns. (N. Y.) R. 65; Tippetts v. Walker et al. 4 Mass. R. 597; Lessee of Jerusha Hatch v. John T. Barr, 1 Ohio R. 390; Savings Bank v. Davis et al. 8 Conn. R. 191; Kinzie v. Chicago, 2 Scammon, (Ill.) R. 187; Bank of Metropolis v. Gutschlieck, 14 Peters, R. 19; Ellnall v. Shaw, 16 Mass. R. 42; Stinchfield v. Little, 1 Greenl. (Me.) R. 231; Decker v. Freeman, 3 Greenl. (Me.) R. 338. See Chap. IX.

⁵ De Zeng and Schermerhorn v. Beekman, 2 Hill, (N. Y.) R. 489.

*session of the land by the grantee.*¹ In the Southern and Western parts of the United States, from New Jersey inclusive, a *flourish with a pen*, at the end of a name, or a circle of ink, or a scroll, has been allowed to be a valid substitute for a seal;² and in the States of Delaware, Virginia, Illinois, Missouri, and Tennessee this substitute has, we believe, been introduced by acts of their legislatures. Though we know no decision upon the subject, yet we see no reason, unless indeed the act of incorporation expressly provides what the common seal shall be, why the substitute allowed for the private seal of an individual should not also be allowed for the seal of a corporation.

§ 3. The old rule of the common law undoubtedly was, that corporations aggregate could contract, or appoint special agents for that purpose, or any other, except for service of the most inferior and ordinary nature, only by deed. In England, this rule has, in modern times, been greatly, though gradually, relaxed; and in our own country, where private corporations of this kind, for every laudable object, have been multiplied beyond any former example, on account of the inconvenience and injustice, which must, in practice, result from its technical strictness, the rule has, as a general proposition, been completely done away.³ The course of modern decisions seems to place corporations, with regard to their mode of appointing agents and making contracts in general, upon the same footing with natural persons. They may appoint all their agents, or make all their contracts, by deed; but are no more compelled so to do, than individuals. Like these, they are subject to the rules established by the common and statute law, and cannot therefore take or grant lands, or certain interest therein, otherwise than by deed.⁴ The statute of frauds

¹ Thorndike v. Barrett, 3 Greenl. (Me.) R. 380.

² 4 Kent, Comm. 445.

³ See chap. VIII. and chap. IX.

⁴ Com. Dig. Franchises, F. 11; Bac. Abr. Corporations, E. 3; 1 Kyd on Corporations, 263; Harper v. Charlesworth, 4 Barn. & Cresw. 575, per Bayley, J.; Union Bank of Maryland v. Ridgely, 1 Harris & Gill, (Md.) 419, 420; Bank of U. S. v. Dandridge, 12 Wheat. R. 105, per Marshall, C. J.; and see Wood v. Tate, 5 Bos. & Pull. 246; The King v. Inhab. of Chipping Norton, 5 East, 240; Doe v. Woodman, 8 East, 228, and supra.

does not require the note or memorandum in writing of contracts for the sale of lands to be sealed ; and accordingly the common seal to such a contract, when made by a corporation, is no more necessary to a recovery upon it at law, or a specific performance of it in equity, than the seal of an individual would be, if the contract had been made by him.¹ That this is the American doctrine there can be no doubt ; but in England, it seems, that a Court of Equity will not compel a public corporation to execute a legal assurance of corporate property, in pursuance of a contract not under the corporate seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the other contracting party on faith of the promised legal assurance.² It is almost unnecessary to remark, that the specialty of a corporation merges its simple contract, as in case of natural persons.³

§ 4. We think it may safely be laid down as a rule without exception, that corporations at this day are capable of making every species of deed. It was once thought that a corporation could not stand seized to a use ; and hence, as a deed of bargain and sale merely passes the use, and the bargainor must stand seized of the land for a moment, that the statute of uses, if we may be allowed the expression, may have time to execute the use ; it was thought, too, that a corporation could not make this species of conveyance. Lord Chief Baron Comyn indeed says, that a corporation may bargain and sell, for they may give a use, though they cannot stand seized to one ;⁴ and founds himself upon a case,

¹ *Maxwell v. Dulwich College*, 1 Fonbl. Eq. 296, n. o. (Phil. ed. 305, n. o.) *Marshall v. Corporation of Queensborough*, 1 Simon's & Stuart's R. 520 ; *Legrand v. Hampden Sydney College*, 5 Munf. (Va.) R. 324 ; *The Banks v. Poitiaux*, 3 Rand. (Va.) R. 143 ; *The London and Birmingham Railway Co. v. Winter*, 1 Craig. & Phil. Ch. R. 63 ; *Mayor of Stafford v. Till*, 4 Bingh. R. 75 ; *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & Johns. (Md.) R. 227.

² *Wilmot et al. v. Corporation of Coventry*, 1 Young & Collyer, R. 518, where see a criticism on preceding English cases.

³ *Van Vlieden v. Welles et al.* 6 Johns. (N. Y.) R. 85.

⁴ *Com. Dig. Bargain and Sale*, B. 3.

where it appeared, that the prioress of Hallywell conveyed certain lands, by the words *dedi et concessi pro certa pecunie summa*, to Lord Chancellor Audley and his heirs. It was objected, that a bargain and sale by a corporation was not good, for it could not be seized to another's use. But the Court rejected the objection as dangerous; for that such were the conveyances of the greater part of the possessions of monasteries. And it was said, that although such a corporation could not take an estate to another's use; yet they might charge their possessions with a use to another.¹ The only principle, however, upon which this case can be supported, that lands may be charged with an use, as with a rent or common, was rejected as an absurdity in Chudleigh's case;² and Mr. Cruise, in his learned and valuable Digest, informs us, that in England, "it is now generally admitted, that a corporation cannot stand seized to an use," with a view to prove that it was incapable of making a deed of bargain and sale.³ In this country, however, the better opinion is, that any corporation may stand seized to an use or trust, as it is called in modern times, for purposes not foreign to the object of its institution; and this is surely most conformable to principle, and convenient in practice.⁴ If this be true, there can be no doubt of the power of a corporation to convey by deed of bargain and sale, as well as an individual. In those States in which livery of seizin is unnecessary to the complete execution of a deed of feoffment, or those in which the old common law deed of grant is made competent to all its purposes, we apprehend, that the question we have been considering is one of very little practical importance: for *ut res magis valeat quam pereat*, no rule of law is better settled, than, if it be necessary to effectuate the intention of the parties, that one species of deed shall be construed as another.⁵ "I exceedingly com-

¹ Holland v. Bonis, 3 Leon. 175.

² 1 Co. R. 127, a.

³ 4 Cruise's Dig. tit. 32, Deed. c. 9, § 12, 13, 14, 15, 16.

⁴ 2 Kent, Comm. 226. See chap. VIII.

⁵ Crossing and Scudamore, 1 Mod. 175; S. C. 2 Lev. 9; S. C. 1 Vent. 137; Walker and Hall, 2 Lev. 213; Coultman and Senhouse, Tho. Jones, 105; Harrison v. Austin, Carth. 38; Roe v. Tranmer, 2 Wils. R. 75; Doe

mend," says Lord Hobart, "the judges that are curious and almost subtil, *astuti*, to invent reason and means to make acts, according to the just *intent* of the parties, and to avoid wrong and injury which, by rigid rules, might be wrought out of the act;"¹ and Lord Hale cites and approves this passage.² It has never, we believe, been doubted that a corporation might *take* by a deed of bargain and sale, as well as any other species of conveyance.

§ 5. 1. In private corporations aggregate, for the sake of convenience, the whole management of their affairs is usually vested by charter in certain officers and boards; the body of the members having no voice except in their election.³ When this is the case, the power of making deeds, like every other power, rests with *them*, and Courts will not interfere upon a petition even of a majority of the *members*, to compel that body, contrary to their own judgment, to affix the common seal to any instrument.⁴ Sometimes, the charter or act of incorporation requires a certain number of a special body, or board existing within the corporation, to be present at the doing of any corporate act, or at the making of particular species of contracts, as deeds; and in such a case, the number must be present at the making of the deed, in order to its validity as a corporate act.⁵ But though by

v. Simpson, 2 Wils. 22; Shephard's Touchstone, 87; Wallis Ex. v. Wallis, 4 Mass. R. 135; Pray v. Pierce, 7 Mass. R. 381.

¹ Hob. 277.

² Crossing and Scudamore, 1 Vent. 141.

³ Bank of U. S. v. Dandridge, 12 Wheat. R. 113, per Marshall, C. J.; Union Turnpike Corporation v. Jenkins, 1 Caine, (N. Y.) R. 381; The Commonwealth v. The Trustees of St. Mary's Church, 6 Serg. & Rawle, (Penn.) R. 508; see Chap. VIII.

⁴ The Commonwealth v. The Trustees of St. Mary's Church, 6 Serg. & Rawle, (Penn.) R. 508; and see Bank of U. S. v. Dandridge, 12 Wheat. R. 113, per Marshall, C. J.; Union Turnpike Corporation v. Jenkins, 1 Caine, (N. Y.) R. 381; McDonough v. Templeman, 1 Har. & J. (Md.) R. 156; Clark v. The Woolen Manuf. Co. of Benton, 15 Wend. (N. Y.) R. 256.

⁵ The President, Managers, and Company of the Berks and Dauphin Turnpike Road v. Myers, 6 Serg. & Rawle, (Penn.) R. 12; Case of St.

charter a certain number of a board are required to concur in *entering* into a special contract, or making a deed, it does not follow that the affixing of the seal, which is merely a ministerial act, may not be done by a less number than were at first competent to enter into the contract, provided it were done by the direction of a legal quorum.¹

2. At the common law, the master, fellows, and scholars of a college, the master or warden, brethren and sisters of a hospital; an abbot or prior and his convent, and a dean and chapter in their aggregate capacity, had unlimited control over the property of their respective houses, and might therefore have made any grant whatever.² In case of an alienation by dean and chapter, the consent of the bishop in his character of ordinary was necessary, in order that the grant or lease should be good beyond the life of the dean who granted or demised.³ The case of an abbot or prior differed from that of a dean, and of a master of an hospital or college; for with respect to the possessions of the house, the whole estate, to certain purposes, was supposed to be vested in him; whereas, in the cases of the master of an hospital, or of a college and dean, the seizin of the joint possessions, of the house was jointly in the master and his brethren and sisters, the master, fellows, and scholars, and in the dean and chapter respectively.⁴ There was, therefore, a difference in the manner in which conveyances were made of the possessions of these several houses; a grant or lease of the possessions of an abbey or priory was regularly made by the abbot or prior, with the *assent* of the convent, because, the convent being composed of persons dead in law, could not with propriety be said to make a lease or grant; though

Mary's Church, 7 Serg. & Rawle, (Penn.) R. 530, per Tilghman, C. J; Hill v. Manchester and Salford Water Works Company, 5 Barn. & Adolph. 866, 2 Nev. & M. 573.

¹ The President, Managers and Company of the Berks and Dauphin Turnpike Road v. Myers, 6 Serg. & Rawle, (Penn.) R. 12; Hill v. Manchester and Salford Water Works Company, 5 Barn. & Adolph. 866; 2 Nev. & M. 573.

² Co. Lit. 44, a. 300, 301; 1 Bur. R. 221; Madox Firma Burgi, c. 1 § 4; 1 Kyd on Corporations, 108.

³ 1 Kyd on Corporations, 109, 110.

⁴ Co. Lit. 347, a. Lit. § 655, 656, 657; 1 Kyd on Corporations, 114.

if it had been said that the abbot and convent made the lease or grant, that would not have been a material objection.¹ In case of an alienation grant or demise by the head of a corporation aggregate of many persons capable without the consent of the proper parties, the deed was void against the successor, and he might enter; whereas, in case of an alienation in fee, tail, or for term of life, by an abbot or prior without the consent of the convent, inasmuch as the fee was vested in him in right of his house, and not of the house jointly with him, the alienation operated as a discontinuance, and the successor was put to his writ of entry *sine assensu capituli*.² The common law restraints being found insufficient to prevent a defalcation of the revenues of these corporations, many statutes have been passed in England limiting the common law right of alienation; but as they are wholly inapplicable to this country, it will be unnecessary for us to notice them.³ Indeed, we have referred to these rules concerning the old corporations aggregate of the common law, rather to illustrate the general principle, that in an alienation of lands, or making of a deed, in order to its validity, they must concur who have an interest in the subject passed, than because we thought them strictly applicable to our institutions. In private incorporated companies existing in this country, the power to make special contracts, alienate lands belonging to the corporation, and the consequent power to make deeds, unless by charter vested in a special board or body, as is most common, rests of course, like every other power, in the members, as a body at large, to be exercised by them through their agents.⁴

§ 7. The corporate seal affixed to a contract or conveyance does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized.⁵ It must be affixed by the

¹ Plowd. 199; Dyer, 40, pl. 1 to 97, pl. 45; Godbolt, 211; 1 Kyd on Corporations, 114.

² Co. Lit. 325, b. 341, b. 342, a. 346, a. b; F. N. B. 194, k; 1 Kyd on Corporations, 115, 116.

³ 1 Kyd on Corporations, from 116 to 162.

⁴ See Chap. IX.

⁵ Jackson v. Campbell, 5 Wend. (N. Y.) R. 572.

officer to whose custody it is confided, or some person specially authorized, the officer or special agent acting in consequence of the directory vote of the body, or managing board of the corporation, as the case may be.¹ A vote of proprietors, authorizing a committee to sell lands, empowers them also to make the necessary deeds in the name of the proprietors, and if a committee of several be appointed who all sign, yet one seal is enough.² The effect of affixing the corporate seal to a contract is the same as when an individual affixes his seal; it makes the instrument a specialty.³ The common law rule with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot in the nature of things be applied to corporations aggregate. These beings of mere legal existence, and their *boards* as such, are, literally speaking, incapable of *personal* act. They *direct* or *assent* by vote; but their most immediate mode of *action* must be by agents. If the principal, the corporation, or its representative, the board, can assent primarily by *vote* alone, to say, that it could constitute an agent to make a deed only by deed, would be to say that it could constitute no such agent whatever; for after all, who could seal the power of attorney, but one empowered by *vote*? When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.⁴ The contrary must be shown by the objecting party.⁵

¹ Derby Canal Company v. Wilmot, 9 East, 360; Bank of U. S. v. Dandridge, 12 Wheat. R. 68, per Story, J.; The President, Managers, and Company of the Berks and Dauphin Turnpike Road v. Myers, 6 Serg. & Rawle, (Penn.) R. 12; Clarke v. The Imperial Gas Co., 4 Barn. & Adolph. 315; 1 Nev. & M. 206.

² Decker v. Freeman, 3 Greenl. (Me.) R. 338.

³ Clark v. The Woolen Manuf. Co. of Benton, 15 Wend. (N. Y.) R. 256.

⁴ Skin. 2; 1 Kyd on Corporations, 268; The President, Managers, and Company of the Berks and Dauphin Turnpike Road v. Myers, 6 Serg. & Rawle, (Penn.) R. 12; The Baptist Church v. Mulford, 3 Halst. (N. J.) R. 183, per Ewing, C. J.; Adams v. his Creditors, 14 Louisiana R. 455; Darwell v. Dicken's lessee, 4 Yerger, (Tenn.) R. 7.

⁵ Ibid. and case of St. Mary's Church, 7 Serg. & Rawle, (Penn.) R. 530,

§ 8. The technical mode of executing the deed of a corporation is to conclude the instrument, which should be signed by some officer, or agent in the name of the corporation, with, "In testimony whereof, the common seal of said corporation is hereunto affixed;" and then to affix the seal. Where, however, two trustees of a parish, who were a corporation, signed their individual names to a lease executed by them in their corporate capacity, and sealed with the common seal opposite to each name, though the signatures, and *double* sealing were unnecessary, it was held, that the lease was not vitiated thereby.¹ Neither is it *necessary* to the validity of a deed by a corporation, that it should say, "Sealed with our common seal," or the like, if the fact otherwise appears.² A mortgage executed and acknowledged by the members of a board of directors who were present, the seal of the corporation being duly affixed was held to be well executed and acknowledged.³ It is prudent to have witnesses to the sealing; for the common seal is not evidence of its own authenticity, but must be proved, not indeed necessarily by one who saw it affixed or adopted, but by one who, from the motto, device, &c., knows it to be the seal of the corporation, as whose it is produced.⁴ The signature of the agent of the corporation, executing the instrument in its behalf, however being proved, the seal, though mere paper and wafer stamped with the common desk seal of a merchant, will be presumed to be intended

per Tilghman, C. J.; *Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. and Bea. R. 226.

¹ *Jackson v. Walsh*, 3 Johns. (N. Y.) R. 225. See too *Clark v. The Manuf. Co. of Benton*, 15 Wend. (N. Y.) R. 256.

² 2 Rol. 21 l. 45; *Goddard's Case*, 5 Co. R. 5; *Comm. Dig. Fait. a*, 2; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) R. 417.

³ *Gordon v. Preston*, 1 Watts, (Penn.) R. 385.

⁴ *Moises v. Thornton*, 8 T. R. 303, 304; *Peake, Law of Evidence*, 48, n; *Starkie on Evidence*, Part 2d, 300, n. 1; *Jackson v. Pratt*, 10 Johns. (N. Y.) R. 381; *Foster v. Shaw*, 7 Serg. & R. (Penn.) R. 156; *Leazure v. Hillegas*, *ibid.* 313; *Den v. Vreelandt*, 2 Halst. (N. J.) R. 352; *Darnell v. Dickins lessee*, 4 Yerger, (Tenn.) R. 7; see *Doe ex dem Woodmass v. Mason*, 1 Esp. R. 53, where Lord Kenyon held, as an exception to the general rule, that the common seal of the *City of London* proved itself. See *Moises v. Thornton*, 8 T. R. 304, per Lord Kenyon.

as the seal of the corporation, until the presumption is rebutted by competent evidence.¹ A seal of a foreign corporation, as that of the City of London, cannot be admitted to be such seal without proof that it is the official seal it purports to be; nor can it be proved by comparison with a similar seal already given in evidence without objection.² Where a corporation by a resolution authorized its president to execute a deed of the corporate lands, and he executed the deed in the name of the corporation, but attested it in this form, "In witness whereof I, — President, have hereunto set *my hand and seal*, &c.," and signed his own name as president opposite to a seal upon which there was no distinct impression; the deed was held inoperative, as the individual deed of the president, who had personally no interest in the subject of the instrument.³ It is unnecessary, that deeds made by Proprietors Committees should contain recitals of their authority and proceedings in the sale; as their certificates of such proceedings are not in themselves evidence of the facts they recite, and such facts may always be proved *aliunde*, and in proper cases will be presumed.⁴

§ 9. The deed of a natural person takes effect only by and from its delivery. This ceremony, however, is unnecessary to the complete execution of the deed of a corporation; since it is said to be perfected by the mere affixing of the common seal. Lord Hale, in a note to Coke Littleton remarks, that "if a dean and chapter seal a deed, it is their deed immediately."⁵ This rule is to be taken with the important qualification, that by the affixing of the seal, the complete execution of the deed was in-

¹ Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) R. 428, Putnam J.

² Chew v. Keek et al, 4 Rawle, (Penn.) R. 163.

³ Lessee of Jerusha Hatch v. John T. Barr, 1 Ohio, R. 390. See Bank of the Metropolis v. Gutschlieck, 14 Peters, R. 19.

⁴ Farrar et al. v. Eastman et al., 5 Greenl. (Me.) R. 345; Inman et al. v. Jackson, 4 Ibid. 237.

⁵ Co. Lit. lib. 1, § 5, 36 a, n. 222; Hargrave & Butler's ed., and see ac Case of the Dean and Chapter of Fernes, Dav. 44; 2 Leon. 97; 1 Vent. 257; 1 Lev. 46; 1 Sid. 8; Carth. 260; 3 Keb. 307; 1 Kyd on Corpor. 268; Contra, 2 Leon. 98, Gawdy, J.

tended ; for if, adds Lord Hale to the above remark, “ they (the dean and chapter) at the same time make letter of attorney to deliver it, this is not their deed till delivery.”¹ In the *Derby Canal Company v. Wilmot*,² it appearing that the order of the managing committee to the clerk, to affix the seal, was accompanied with a direction to retain the conveyance in his hands until accounts were adjusted with the purchaser, it was held by the Court of King’s Bench, that notwithstanding the affixing of the common seal, the deed was incomplete ; Lord Ellenborough, as the organ of the Court, observing, “ that in order to give it (the deed) effect, the affixing of the seal must be done with an intent to pass the estate ; otherwise it operates no more than a feoffment would do without livery of seizin.”

¹ Co Lit. lib. 1, § 5, 36 a, n. 222 ; Harg. & Butler’s ed. ; and see *Willis v. Jermin*, Cro. E. 167 ; W. Jones, 170 ; Palm. 504.

² 9 East, 360.

CHAPTER VIII.

OF THE MODE IN WHICH A CORPORATION MAY CONTRACT,
AND WHAT CONTRACTS IT MAY MAKE.

§ 1. IN accordance with the notion, that corporations aggregate could express their assent only by their common seals, the ancient doctrine of the common law, as has been considered, was, that they could bind themselves only by deeds, or special contracts. However well established this may have been, as a rule of the Courts, its extreme inconvenience must always have effectually denied it currency, as a rule of practice. It can hardly be believed, that in their daily commerce for the necessities and elegancies of life, for the decorations of their chapels and churches, for the building and repairing of their houses, and the tillage and improvement of their lands, the various religious communities, anciently so numerous and well endowed in England, contracted only by deed. Of necessity, their superiors and authorized agents must have bought and sold, bargained and contracted for them, without the delaying intervention of sealed instruments. Municipal corporations, too, whose bargains and purchases must have been numerous in the most ancient times, for the improvement and defence of their towns, for articles of civic pomp and display, can hardly be supposed to have contracted for them in all their details by deed. The inconsistency of the professed principle or reason of this doctrine with fact, is apparent also, at a glance ; for it was always the practice of corporations aggregate to express their assent in the elections of their officers by *vote* ; and it appears to have been early settled, that this was a legal mode of appointing servants or agents of inferior and ordinary service.¹

Owing to this inconsistency, and the obvious injustice which might sometimes result from a rigid enforcement of the old rule,

¹ See Chap. IX.

it has in modern times been somewhat relaxed even in England. In our own country, where private corporations for literary, religious, and commercial purposes, have been multiplied beyond any former example, their facility in acting and contracting is involved with public prosperity itself; and after mature consideration, the old technical rule has been condemned as impolitic, and essentially discarded.¹ Indeed, it seems to result from the very structure of these artificial beings, that inasmuch as there are two general modes in which they may express their assent, there are two general modes in which they may expressly contract, first by *vote*, and secondly by their duly authorized agents.² We propose accordingly in this chapter, after treating of the general modes in which private corporations aggregate may contract, with whom, and in what name, to consider what *kind* of contracts, and *what* contracts, in general, they may make.

§ 2. The course of modern decisions, and particularly in our own country, seems to have assimilated in some degree the mode, in which corporations may contract with us, with that usual in bodies of this kind, existing under the Roman Civil Law. Mr. Ayliffe, who cites the Digest and Castrensis, tells us, that “a corporation may, *in its own person*, whenever it pleases, do any extrajudicial act, as make contracts, and the like, and shall not be compelled to constitute a syndick (as in judicial acts) for the dispatch of any public business of this kind; for a corporation may celebrate contracts, by its own proper *decree*, without constituting a syndick.”³ Again, he says, “corporations are bound by their contracts in the same manner as individual persons are; for though the members of a corporation cannot separately and individually give their consent in such manner as to oblige themselves as a collective body; yet, being lawfully assembled, it represents but one person, and may consequently make contracts, and, by their collective consent, oblige themselves thereunto.

¹ 2 Kent, Comm. 233.

² See Chap. IX.

³ Ayliffe, Civil Law, tit. 35, b. 2 p. 198; Castrensis, in l. 1, d. 3, 4.

And thus a corporation may consent, though not with the same readiness and facility as particular persons."¹ Indeed, it would be strange, if when it was settled that a corporation might by vote or decree appoint an agent whose contracts would be binding upon it,² it could not by vote or decree make the same contracts itself. Accordingly, although in *Taylor v. Dullidge Hospital*,³ Lord Chancellor Parker refused to compel the specific performance of an agreement for a lease signed by the master, warden, and fellows of the corporation, on the ground, that to bind that (or indeed any corporation, *as to its revenue*) the contract must be under its common seal; yet, sixty-three years afterwards it appears to have been decreed in the case of *Maxwell v. Dullidge Hospital*,⁴ that the specific performance of an agreement of the major part of a corporation entered in the corporation books, though not under the corporate seal, should be compelled, and this decision has been cited and relied on, by the highest authority in this country.⁵ In the *Andover and Medford Turnpike Corporation v. Hay*,⁶ it is said by the learned Chief Justice Parsons, speaking as the organ of the Supreme Court of Massachusetts, that "we cannot admit that a corporation can make a parol contract, unless by the intervention of some agent or attorney, duly authorized to contract on their part." This language, we apprehend, is to be limited in its application to the facts before the court. That was an action of the case against the defendant, as the proprietor of four shares in a turnpike road, for not paying sundry assessments duly made by the directors of the corporation; and a loose declaration by him in an open meeting of the corporation, "that if one thousand dollars were not enough to make the turnpike, he would spend two thousand dollars, and

¹ Ayliffe, Civil Law, sup. d. 12, 1, 27.

² See Chap. IX.

³ 1 P. Wms. 655.

⁴ 1 Fonbl. Eq. 296, n. o. (Phil. ed. 305, n. o.)

⁵ *Bank of United States v. Dandridge*, 12 Wheat. R. 95, per Marshall, C. J.; and see *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill's (Md.) R. 425, per Buchanan, C. J.

⁶ 7 Mass. R. 107. •

if that was not enough, he would spend half his estate," was held insufficient evidence of a contract on the part of the defendant with the corporation, to pay such assessments as should be made by the directors upon his shares. It needs hardly be added, that whether we consider the nature of the language used by the defendant in this case, or the fact, that there was by vote no acceptance of, or in conduct no reliance on, his proposition on the part of the corporation, this, without the principle laid down by the learned Chief Justice, could not be held a serious contract. We apprehend, that a corporation may as well immediately by vote express its assent and contract, as mediately through an agent, authorized by vote.¹ It may as well express by vote its assent to a proposition, as to the appointment of an agent, or the acceptance of a charter; and we know no case in which the power to act by an agent is greater than the power to act in person. A distinct proposal made in a corporate meeting, and accepted by corporate vote, would unquestionably constitute a contract binding upon the corporation; and where the agreement was entered upon the corporation books, this seems to have been held even in England.² In the *Essex Turnpike Corporation v. Collins*,³ Sedgwick, Justice, in delivering the opinion of the court, tells us, that "aggregate corporations cannot contract without vote, because there is no other way, in which they can express their assent." He adds, however, that such corporations may contract by authorized agents.

In a late English Chancery case, it appeared that the bill filed charged a municipal corporation with having given a license to the complainant to fill up a part of a creek, and make a wharf, and erect buildings thereon, adjoining a piece of land he held under lease from them, in consequence of which license, he had with their knowledge taken possession and erected the wharf and buildings at his expense, and prayed that they might be decreed to grant him a lease. The counsel of the complainant, on the

¹ See, however, contra, *Garvey v. Colcock*, 1 Nott and McCord, (S. C.) R. 231.

² *Maxwell v. Dullidge Hospital*, 1 Fonbl. Eq. 296, n. o. (Phil. ed. 305, n. o.) See *Magill v. Kauffman*, 4 Serg. & Rawle, (Penn.) R. 317.

³ 8 Mass. R. 298, 299.

hearing, contended that the corporation acting by a majority of its members, and at a regular meeting, and giving a license to the complainant to do an act by which he had incurred expense, was bound thereby. For the corporation it was insisted, that a contract, to be binding on it, must be under the common seal, and that no such contract was shown. The case stated in the bill not being proved, the bill was dismissed. The vice chancellor, Sir John Leach, said, however, that if a regular corporate resolution passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, he inclined to think that both principle and authority would be found, for compelling the corporation to make a legal grant in pursuance of that resolution.¹ It seems, from a still more recent case,² in England, that a court of Equity there will not compel a corporation to execute a legal assurance of corporate property, in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the party contracting with the corporation on faith of the promised legal assurance. In this country it is very clear, that no such equities would be necessary to sustain the contract made by an authorized committee or agent, though not under the corporate seal.³

§ 3. The great number of the members, of which corporations aggregate usually consist, renders their undoubted right of contracting by vote, in general, extremely inconvenient; and accordingly their usual mode of contracting is through the intervention of agents, duly authorized for that purpose. These are either persons specially appointed and authorized for the occasion, or, as is more common, the general officers and boards, as directors, managers, &c., existing within the corporation, — elected, it is

¹ *Marshall v. The Corporation of Queensborough*, 1 *Simon's & Stuart's R.* 520; and see *The Lond. and Birmingham. Rail Road Co. v. Winter*, 1 *Craig & Phil. Ch. R.* 63.

² *Wilmut et al. v. Corporation of Coventry*, 1 *Young & Collyer, R.* 518.

³ *Stanley v. Hotel Corporation*, 13 *Maine R.* 51; *Stoddert v. Port Tobacco Parish*, 2 *Gill & Johns. (Md.) R.* 227.

true, by the members, but usually deriving their ordinary powers from the charter, or act of incorporation. This instrument frequently prescribes, too, their mode of action; and we need hardly add that where this is the case, its injunctions must be rigidly pursued. In modern corporations created by statute, the charter ordinarily contemplates the business of the corporation to be transacted exclusively by a special body or board of directors;¹ and the acts of such body or board, evidenced by a legal vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. If these boards are appointed, and act, in the mode prescribed by the statute creating the corporation, to suppose that they were not the agents of the corporation for any purpose within the range of their duties, because not appointed under the corporate seal, or that their contracts were invalid because not solemnized by it, would be, in the language of the learned Mr. Justice Story, "to suppose, that the common law is superior to the legislative authority; and that the legislature cannot dispense with forms, or confer authorities, which the common law attaches to general corporations."² As we propose to treat of corporate agents in the succeeding chapter, we beg leave to refer to that, for the mode in which corporations aggregate of a private nature may contract by them.³

Indeed, as these bodies have, either by the particular laws of their incorporation, or by the general laws of the land, power to regulate and order their affairs, no rule applicable to all corpora-

¹ *Union Turnpike Company v. Jenkins*, 1 Caine, (N. Y.) R. 381.

² *Fleckner v. U. S. Bank*, 8 Wheat. R. 357, 358. And see *Andover &c. Turnpike Corporation v. Hay*, 7 Mass. R. 102; *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. R. 397; *Essex Turnpike Corporation v. Collins*, 8 Mass. R. 292; *Dana v. St. Andrews Church*, 14 Johns. (N.Y.) R. 118; *Union Bank v. Ridgely*, 1 Har. & Gill. (Md.) R. 324; *Kennedy v. Baltimore Ins. Co.*, 3 Har. & Johns. (Md.) R. 367; *Garrison v. Combs*, 7 J. J. Marsh, (Ken.) R. 85; *Savings Bank v. Davis*, 8 Conn. R. 191; *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) R. 324; *Stanley v. Hotel Corporation*, 13 Maine, R. 51; *Stoddert v. Port Tobacco Parish*, 2 Gill & Johns. (Md.) R. 227; *Andrews v. Estes et al*, 2 Fairf. (Me.) 267.

³ See chap. IX.

tions can be laid down, with regard to their mode of contracting. This must differ with their rules and course of doing business ; and if they have practically, or upon system, neglected or dispensed with any precautions, which at common law were deemed essential to their security, still, if there is sufficient evidence of a common consent, of a joint and corporate act, they must be considered as liable ; especially where individuals, who have trusted to the good faith of the corporation, would be injured and deprived of their remedy, if any other construction of the doings of the corporation was adopted.¹ Though a payment be made irregularly by the President of a corporation, yet when it was justly due, and there was no reason for withholding it, it cannot be recovered back on the ground, that the president had verbal directions only from the directors to make it.²

§ 4. The members of a corporation aggregate cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body ; for in such case it is not the *body* that acts ; and this is no less the doctrine of the common, than of the Roman Civil Law. “ Being *lawfully assembled*,” says Ayliffe, “ they represent but one person, and may consequently make contracts, and, by their collective consent, oblige themselves thereunto.”³ And though all the members of a corporation covenanted on behalf of it under their private seals, binding themselves and their heirs, that the corporation should do certain acts, it was decided that they were *personally* bound.⁴

§ 5. By the common law, and by the Civil Code too, as a

¹ Hayden et al. v. Middlesex Turnpike Corporation, 10 Mass. R. 401, per Sewall, J.

² New Orleans Building Co. v. Lawson, 11 Louisiana R. 34.

³ Ayliffe, Civil Law, Tit. 35, B. 2, p. 198 ; 1 Black. Comm. 475 ; Hayden et al. v. Middlesex Turnpike Corporation, 10 Mass. R. 403, per Sewall, J ; The Proprietors of the Canal Bridge v. Gordon, 1 Pick. (Mass.) R. 304 ; Hartford Bank v. Hart, 3 Day, (Conn.) R. 491 ; Waterbury v. Clark, 4 ib. 198 ; Society of Practical Knowledge v. Abbot, 2 Beavan, Ch. R. 559 ; Ruby v. Abyssinian Soc. 15 Maine R. 306.

⁴ Tileston et al. v. Newell et al., 13 Mass. R. 406.

corporation aggregate may contract with persons who are not members, so it may contract with persons who are members of it; and the contract is not on this account invalid;¹ a member of a corporation contracting with it being regarded as to that contract, a stranger.² And though the members of three distinct corporations were the same, yet in *The Proprietors of the Canal Bridge v. Gordon*,³ it was held by the Supreme Court of Massachusetts, that contracts between the several corporations were valid, and might even be implied from corporate acts.

§ 6. Corporations may be known by several names as well as natural persons;⁴ and accordingly the misnomer of a corporation in a grant, obligation, or other written contract, does not prevent a recovery thereon either by or against the corporation in its true name, provided its identity with that intended by the parties to the instrument be averred in pleading, and apparent in proof. Lord Coke notes a just distinction in this particular between writs and grants; "for if," says he, "a writ abates, one might of common right have a new writ, but he cannot of common right have a new bond or a new lease."⁵ In illustration and support of the rule above laid down, a special verdict found that the defendant's testator made, sealed, and as his deed delivered, a writing obligatory to the plaintiffs, whose true style was, The Mayor and Burgesses of the borough of the lord the king of Lynne Regis, commonly called King's Lynne in the county of Norfolk, by the name of the Mayor and Burgesses of King's Lynne in the county of Norfolk; and judgment was given to the

¹ Ayliffe, Civil Law, Tit. 35, B. 2, p. 198; *Worcester Turnpike v. Willard*, 5 Mass. R. 85, per Parsons, Ch. J.; *Gilmore v. Pope*, ib. 491; *The President, Managers, and Company of the Berks and Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawle, (Penn.) R. 12; *Gordon v. Preston*, 1 Watts, (Penn.) R. 385.

² *Hill v. Manchester Water Works Company*, 2 Nev. & M. 583; 5 Barn. & Adolp. 866.

³ 1 Pick. (Mass.) R. 297.

⁴ *Minot v. Curtis et al.*, 7 Mass. R. 444, per cur. Ante, Chap. III. § 4.

⁵ *The Case of the Mayor and Burgesses of Lynne Regis*. 10 Co. R. 125.

plaintiffs.¹ The learned reporter of the above case, cited, with many others, the case of the Abbot of York, who was incorporated by the name of "the Abbot of the monastery of the blessed Mary of York;" and a bond was made to the abbot by the name,— "The Abbot of the monastery of the blessed Mary, without *the walls* of the City of York." The Abbot brought his action of debt by his true name, which implies an averment, that the abbey was within York; and although the abbey was without *the walls*, yet because it was in truth within the *city* of York, the bond and writ were adjudged good by the opinion of the whole Court.² In our own country, this rule has been repeatedly recognised. An action by "the *Medway Cotton Manufactory*," on a note given to "Richardson, Metcalf, and Co.;"³ also one on a bond, by "The New York African Society for Mutual Relief," given to the standing committee of "The New York, &c.," *solvendum* to the corporation, by its true name,⁴ has been supported on demurrer, there being proper averments in the pleadings. With proper averments and proof, recoveries have been had, too, on bonds given to a corporation, with an erroneous omission of the county⁵ or addition of the state,⁶ in which it was located in the corporate name. In the *President, &c. v. Myers*,⁷ the declaration set forth a covenant with "the President, Managers, and Company of the Berks and Dauphin Turnpike road,"

¹ The case of the Mayor and Burgesses of Lynne Regis. 10 Co. R. 123.

² *Ib.* where see cited, also, the case of the Hospital of Savoy; the case of Eaton College, Dy. R. 150; Case of Dean and Chapter of Carlile; Case of Dean and Canons of Windsor; Case of Merton College in Oxford.

³ *Medway Cotton Manufactory v. Adams et al.*, 10 Mass. R. 360.

⁴ *African Society v. Varick*, 13 Johns. (N. Y.) R. 38.

⁵ *Woolwich v. Forrest et al.*, 1 Penning. (N. J.) R. 115; *The inhabitants of the township of Middletown, in the county of Monmouth v. McCormick*, 2 Penning. (N. J.) R. 500.

⁶ *The Inhabitants of the township of Upper Alloways Creek in the county of Salem v. String*, 5 Halst. (N. J.) R. 323.

⁷ 6 Serg. & Rawle, (Penn.) R. 12; and see *The Culpepper Agricultural and Manufacturing Society v. Digges*, 6 Rand. (Va.) R. 165; *The Hager's Town Turnpike Road Co. v. Cruger*, 15 Harris & Johns. (Md.) R. 122; *Pendleton v. Bank of Kentucky*, 1 Munroe, (Ky.) R. 175.

and the instrument produced on trial contained a covenant with "the Berks and Dauphin Turnpike Company." Gibson, J. in delivering the opinion of the Court, said ; "In pleading, the style or corporate name must be strictly used ; and while the law was, that a corporation could speak only by its seal, the same strictness in the use of the style was also necessary in contracting. But when the courts began to allow these artificial beings, most, if not all the attributes of natural existence, and to permit them to contract pretty much in the ordinary manner of natural persons, a correspondent relaxation in the use of the exact corporate name, for the purposes of designation, necessarily followed. I take the law of the present day to be, that a departure from the strict style of the corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended, and that a latent ambiguity may under proper averments be explained by parol evidence in this, as in other cases, to show the intention." With deference, however, to the learned Justice we have quoted, we apprehend that the rule he notes as a relaxation from the strictness prevailing, when corporations aggregate could contract only by seal, was the true doctrine of the common law, even in those ancient days. For Lord Coke in *Sir Moyle Finch's case*,¹ says, "it was observed, that till this generation of late times it was never read in any of our books, that any body politic or corporate, endeavored or attempted, by any suit, to avoid any of their leases, grants, conveyances, or other of their own deeds, for the misnomer of their true name of corporation ; but after that a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles (to avoid grants, &c., as well made to them as by them) have followed thereupon, every body knows ; but it was said, for every curious or nice misnosmer, God forbid that their leases, or grants, &c., should be defeated ; for there will be found a difference between writs and grants ; and in all cases, this is true, *quod apices juris non sunt jura*."

¹ 5 Co. R. 65 ; The case of the Mayor and Burgesses of Lynne Regis, 10 Co. R. 125, 126 ; and see *Commercial Bank v. French*, 21 Pick. (Mass.) R. 490 ; *Charitable Association in Middle Granville v. Baldwin*, 1 Metcalf, (Mass.) R. 365 ; *City of Lowell v. Morse*, Ibid. 473.

§ 7. Having, in the preceding chapter,¹ considered the special contracts of corporations, we proceed now to the inquiry, whether they are competent to make contracts of any other kind. The ancient rule of the common law was, undoubtedly, that they were not; and this, with the probable reason of it, we have before endeavored to explain.² It is certain that this rule has been relaxed somewhat in England; as, in the case of *Maxwell v. Dullidge Hospital*,³ before cited, and in *Parbury and another v. The Governor and Company of the Bank of England*,⁴ in which, by the suggestion of Lord Mansfield,⁵ a special action of assumpsit was brought against the bank, and tried before him, without objection to the form of the remedy. In *Broughton v. The Manchester Water Works Co.*,⁶ Lord Chief Justice Abbott declined entering "into the general question, whether an action of assumpsit will, in any case, lie against a body corporate;" as though this might be considered as open to discussion even in England; and in *Harper v. Charlesworth*,⁷ it was said by Mr. Justice Bayley, that "a corporation can only grant by deed; yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff and do other things of a like nature." The general rule in England seems, however, still to be, that a corporation aggregate cannot expressly bind itself but by deed, unless the act establishing it authorizes it to contract in another mode, or obviously contemplates that it shall so do, as make promissory notes, in order to attain the object, or do the business, for which it was created." Where "a

¹ See Chap. VII.

² Ibid.

³ 1 Fonbl. Eq. 296, n. o.

⁴ Doug. R. 526, n. 1.

⁵ *The King v. The Bank of England*, Doug. R. 526.

⁶ 3 Barn. & Ald. 7.

⁷ 4 Barn. & Cressw. 575.

⁸ *Slark v. Highgate Archway Company*, 5 Taunt. R. 792; *Broughton v. Manchester Water Works Co.* 3 Barn. & Ald. 1; *Marshall v. The Corporation of Queensborough*, 1 Simon & Stuart, R. 520; *London and Birmingham Railway Co. v. Winter*, 1 Craig. & Phil. 63; *Mayor of Stafford v. Till*, 4 Bingh. R. 75; *Wilmot et al. v. Corporation of Coventry*, 1 Young &

company, like the bank of England, or the East India Company, are incorporated for the purposes of trade, it seems," says Mr. Justice Best, "to result from the very object of their being so incorporated that they should have power to accept bills, or issue promissory notes; since, without such power, it would be impossible for either of these companies to go on."¹ We find, indeed, in *Edie v. The East India Company*,² and from *The Bank of England v. Moffat*,³ that actions on simple contracts have been maintained against these institutions, without the objection we are considering. If the contract, however, be executed, the general rule above stated does not seem to be applied; and hence assumpsit for use and occupation may be maintained by a corporation aggregate, against a tenant who has occupied under them and paid rent.⁴

In *Beverly v. Lincoln*,⁵ it was held, that a corporation aggregate, might be sued in assumpsit on a contract by parol, express or implied, for goods sold and delivered, and in *Church v. The Imperial Gas Company*,⁶ that it made no difference as to the right of a corporation to sue on a contract made by them without seal, whether the contract be executed or executory. The English Law on this subject is evidently in a state of slow transition.⁷

The old rule of the English Law was at first adopted in Pennsylvania; and in *Breckbill v. Turnpike Company*,⁸ it was decided, that implied assumpsit could not be maintained against a corporation, on the ground that such a body could contract only by deed under the corporate seal; but this case was afterwards overruled, in *The Chestnut Hill and Spring House Turnpike Company v.*

Collyer, R. 518; *Ludlow Corporation v. Charlton*, 9 Car. & Payne, Ch. R. 242; *East London Water Works Co. v. Bailey*, 4 Bingh. R. 233; *Dunston v. Imperial Gas Light Company*, 3 Barn. & Adolph. 125.

¹ *Broughton v. Manchester Water Works Co.* supra.

² 2 Burr. R. 1216, S. C.; 1 Black. R. 295.

³ 3 Bro. Ch. R. 262.

⁴ *Mayor of Stafford v. Till*, 4 Bing. R. 75; 12 B. Moore, R. 260.

⁵ 6 Adolph. & Ellia, 829.

⁶ *Ibid.* 846.

⁷ See *De Grave v. Monmouth*, 4 Car. & Payne, 111.

⁸ 3 Dallas, (Penn.) R. 496.

Rutter.¹ The same rule once prevailed in Kentucky,² but has now given way to the current of modern decisions.³ In commenting upon the law, ancient and modern, on this subject, the learned Mr. Justice Story informs us, that the principle, that corporations aggregate could do nothing but by deed under their common seal, "must always have been understood with many qualifications, and seems inapplicable to acts and votes passed by such corporations at their corporate meetings. It was probably in its origin applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. The rule," he observes, "has been broken in upon in a vast variety of cases in modern times, and cannot now as a general proposition be supported."⁴ In general, throughout the United States, it is entirely exploded; and it is here well settled, that the acts of a corporation, evidenced by vote written or unwritten,⁵ are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents, as by deed; and that promises might as well be implied from its acts and the acts of its agents, as if it had been an individual.⁶

¹ 4 Serg. & Rawle, (Penn.) R. 6.

² Frankfort Bank v. Anderson, 3 Marsh. (Ky.) R. 1; McBean v. Irvin's Ex'ors. 4 Bibb. (Ky.) 17; 1 Marsh. (Ky.) R. 105; Hughes v. Bank of Somerset, 5 Litt. (Ky.) R. 47.

³ Waller v. Bank of Kentucky, 3 J. J. Marsh. (Ky.) R. 201; Loe v. Flemingsburgh, 7 Dana, (Ky.) R. 28; Muir et al. v. Canal Co., 8 Dana, (Ky.) R. 161.

⁴ Bank of U. S. v. Dandridge, 12 Wheat. R. 68.

⁵ Ibid.

⁶ Bank of Columbia v. Patterson's Admrs., 7 Cranch, R. 305, 306; Mechanics Bank of Alexandria v. Bank of Columbia, 5 Wheat. R. 326; Fleckner v. U. S. Bank, 8 Wheat. R. 357; Bank of U. S. v. Dandridge, 12 Wheat. R. 68; Dunn v. Rector of St. Andrew's Church, 14 Johns. (N. Y.) R. 118; Overseers of North Whitehall v. Overseers of South Whitehall, 3 Serg. & Rawle, (Penn.) R. 117; Legrand v. Hampden Sydney College, 5

§ 8. 1. It having once been established, that corporations might contract otherwise than by their corporate seals, — that they might make parol promises, either by vote, or through their authorized agents, no reason could be found in technical principle or substantial justice, why they should not be subject and entitled to the same presumptions, as natural persons. Indeed, it seems early to have been settled, that a charter may be presumed to have been given to persons who have long acted as a corporation ; though the very case supposes that no other proof, than the long continued exercise of corporate powers, could be adduced, of a charter, or of a vote of the corporators to accept it.¹ It had been held also, that the acceptance of a particular charter by an existing corporation, or by corporators already in the exercise of corporate powers, may be inferred from the acts of corporate officers, or facts which demonstrate that it must have been accepted ; and that it is not indispensable to show a written instrument or vote of acceptance on the corporation books.² From the

Munf. (Va.) R. 324 ; *The Banks v. Poitiaux*, 3 *Rand. (Va.) R. 143* ; *Union Bank of Maryland v. Ridgely*, 1 *Harris & Gill, (Md.) R. 413* ; *Hayden et al. v. Middlesex Turnpike Corporation*, 10 *Mass. R. 401* ; *White v. The Westport Cotton Manufacturing Company*, 1 *Pick. (Mass.) R. 215* ; *Bulkely et al. v. The Derby Fishing Co.*, 2 *Conn. R. 256* ; *Witte v. same*, *ibid.* 260 ; *Waring v. The Catawba Company*, 2 *Bay. (S. C.) R. 109* ; *Garvey v. Colcock*, 1 *Nott & McCord, (S. C.) R. 231* ; *The Inhabitants of the 4th School District in Rumford v. Wood*, 13 *Mass. R. 193* ; *Baptist Church v. Mulford*, 3 *Halst. (N. J.) R. 182*, et *infra* ; and see *Gray v. Portland Bank*, 3 *Mass. R. 364* ; *Sanger v. The Inhabitants of the Third Parish in Roxbury*, 8 *Mass. R. 265* ; *Titcomb v. Union Marine and Fire Insurance Co.*, 8 *Mass. R. 326* ; *Brown v. Penobscot Bank*, *ib.* 445 ; *Dorr v. Union Insurance Co.*, *ib.* 494 ; *Shotwell v. McKeown*, 2 *South. (N. J.) R. 828* ; *Abbot v. Hermon*, 7 *Greenl. (Me.) R. 118* ; *Waller v. Bank of Kentucky*, 3 *J. J. Marsh. (Ky.) R. 201* ; *Lee v. Flemingsburg*, 7 *Dana, (Ky.) R. 28* ; *Muir et al. v. Canal Co.* 8 *Ibid.* 161 ; *Buncombe Turnp. Co. v. McCarson*, 1 *Dev. & Bat. (N. C.) R. 310* ; *Bates and Hines v. Bank of Alabama*, 2 *Alabama R. 452* ; *Eastman v. Coos Bank*, 1 *New Hamp. R. 26* ; *Maine Stage Company v. Longley*, 14 *Maine R. 444* ; *Bank of Metropolis v. Gutschlieck*, 14 *Peters, R. 19* ; *Poultney v. Wells*, 1 *Aiken, (Vt.) R. 180*.

¹ *Bank of U. S. v. Dandridge*, 12 *Wheat. R. 71*. See Chap. II. § 8.

² *Ibid.* and *The King v. Amery*, 1 *T. R. 575* ; *S. C. 2 T. R. 515* ; *Newling v. Francis*, 3 *T. R. 189* ; See *Middlesex Husbandmen v. Davis*, 3 *Metcalf, (Mass.) R. 133*.

same species of evidence, the enactment¹ and repeal² of by-laws have been inferred. Again, in the case of *Wood v. Tate*,³ which was replevin upon a distress, made by the bailiff of the borough of Morpeth, for rent, it appeared in evidence that the tenant went into possession under a lease void for not being executed under the corporate seal, even if made by proper officers; yet the court held, that though the lease was void, the tenant was to be deemed tenant from year to year under the corporation; and his payment of rent from time to time to its officers was sufficient proof of tenancy under the corporation, on which it might distrain for the rent in arrear. In *Doe v. Woodman*⁴ also, where certain premises had been demised by the plaintiff to the corporation, as tenant from year to year, at an annual rent, though it does not appear in what manner the demise had been accepted, except by the payment of rent by the bailiff, as such, it seems to have been taken for granted that this was proper evidence of a holding by the corporation. In this country it has been settled by repeated decisions, that all duties imposed on corporations aggregate by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.⁵ In assumpsit against a bank, where it appeared that the committee of the corporation had contracted expressly under their private seals, although it was held that an action might have been maintained against the committee personally, yet inasmuch

¹ *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, (Md.) R. 413.

² *Attorney General v. Middleton*, 2 Ves. Sr. 328.

³ 5 Bos. & Pul. 246; and see 1 Roll, R. 82; 2 Lev. 174, S. C.; 1 Vent. 298; 2 Lev. 252; *Dean and Chapter of Rochester v. Pierce*, 1 Campb. N. P. R. 466; *Mayor, &c. of Stafford v. Till*, 4 Bingham, R. 75.

⁴ 8 East, R. 228.

⁵ *Salem Bank v. Gloucester Bank*, 17 Mass. R. 1; *Gloucester Bank v. Salem Bank*, 17 Mass. R. 33; *Foster et al. Ex'ors. v. The Essex Bank*, 17 Mass. R. 479; *Smith et al. v. First Congregational Meetinghouse in Lowell*, 8 Pick. (Mass.) R. 178; *Bank of Kentucky v. Wister et al.* 2 Peters, R. 318; *Trustees of Limerick Academy v. Davis*, 11 Mass. R. 113; *Trustees of Farmington Academy v. Allen*, 14 Mass. R. 172; *Amherst Academy v. Cowles*, 6 Pick. (Mass.) R. 427; *Kennedy v. Baltimore Insurance Co.* 3 Harris & Johns. (Md.) R. 367.

as the whole benefit of the contract resulted to the corporation, and on the faith of the transaction it had from time to time proceeded to pay money, the court were of opinion, that from evidence of this, the jury might legally infer an adoption of the contract, and a vote to pay the whole sum due under it by the corporation, and an acceptance of this engagement by the plaintiff's intestate.¹ In case, too, of *Dunn v. St. Andrew's Church*,² where it was in proof that the plaintiff had performed services as clerk of the church, for which he had received payments at several times, the records of the corporation containing entries thereof; but no resolution was recorded, appointing the plaintiff clerk of the church, nor was there any other proof of his appointment; the Court held a vote of appointment unnecessary to be shown; as there was sufficient proof of an implied promise of the corporation to make compensation.

It should be observed, however, that since individual members of a corporation cannot, unless authorized, bind the body by express promises, neither can any corporate engagements be implied from their unsanctioned conduct or declarations.³ As corporations can be expressly bound only by joint and corporate acts, so it is only from such acts, done either by the corporation as a body, or by its authorized agents, that any implication can be made, binding it in law. Upon a claim of the amount of their disbursements for work done upon a turnpike road, the plaintiffs not being able to prove any request by an authorized agent of the corporation; but only that their men were seen at work upon the road by different members of the body, and by an agent who was

¹ *Bank of Columbia v. Patterson's Admr.* 7 Cranch, 306; *Randall v. Van Vechten and others*, 19 Johns. (N. Y.) R. 65, per Platt, Jus.; and see 12 Wheat. R. 72.

² 14 Johns. (N. Y.) R. 118; and see *The Inhabitants of Mendham v. Losey*, 1 Penning. (N. J.) R. 347; *The Inhabitants of the Township of Saddle River v. Colfax*, 1 Halst. (N. J.) R. 115; *The Baptist Church v. Mulford*, 3 Halst. (N. J.) R. 191, 192; *Powell et al. v. Trustees of Newburgh*, 19 Johns. (N. Y.) R. 284; *The Chestnut Hill and Spring House Turnpike Company v. Rutter*, 4 Serg. & Rawle, (Penn.) R. 6.

³ *The Proprietors of the Canal Bridge v. Gordon*, 1 Pick. (Mass.) R. 304; *Ruby v. Abyssinian Soc.*, 15 Maine R. 306.

authorized to contract on its part, *but in writing only*; the court held the evidence insufficient to raise a promise by the Turnpike Company to pay the amount of the disbursements.¹

Though a contract made by the minority of a purchasing committee is not binding on a corporation, the ratification of their contract by the corporation may be inferred from facts attending the transaction.² And generally, if persons assuming to act as agents of a corporation, but without legal authority, make a contract and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract and render the corporation liable thereon.³

But in *Magill v. Kauffman*,⁴ which was ejectment for land claimed by a Presbyterian Congregation, before incorporation, under a purchase by their trustees, and after incorporation, claimed in their right as a corporation, the Supreme Court of Pennsylvania held, that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting the corporate business, and also evidence of *what passed at the meetings of the congregation when assembled on business*, were admissible to show their possession of the land, and the extent of their claim. And where the same individuals, being members of a dam or causeway corporation which had no right of toll, and also of a canal bridge corporation which had a right of toll, as the proprietors of the causeway, voted that the free use of it be granted to the proprietors of the bridge, provided the proprietors of the bridge give the proprietors of the causeway the free use of a certain portion of the bridge, and keep the same in repair, and provided that the proprietors of the causeway have power to fill up that part of the bridge so as to make it a solid dam, whenever they should deem it expedient; it was held, that proof that a cross-bridge was built from the causeway

¹ *Hayden, et al. v. Middlesex Turnp. Corp.* 10 Mass. R. 397. See *Burdick v. Champl. Glass Co.*, 8 Vermont R. 19.

² *Trott et al. v. Warren* 2 Fairf. (Me.) R. 225.

³ *Episcopal Charitable Soc. v. Episcopal Church in Needham*, 1 Pick. (Mass.) R. 372; *Bank of Columbia v. Patterson*, 7 Cranch 299; *Randall v. Vanvochten*, 19 Johns. (N. Y.) R. 60.

⁴ *Serg & Rawle*, (Penn.) R. 317.

to the canal bridge, and no tolls for four years demanded of those passing over the causeway, cross-bridge, and canal bridge, or *vice versa*, was sufficient proof that the above proposition was accepted ; although no vote of acceptance could be found in the books of the canal bridge corporation ; and as a consequence, it was held, that no toll could be demanded by the proprietors of the canal bridge of those passing over it by way of the cross-bridge, or dam.¹ In a case in which the rector and wardens of a church corporation, consisting of rector, wardens, and vestry merely, being authorized by a vote of the pew proprietors who were no part of the corporation, borrowed money of a charitable society for the use of the church, and gave a note in their official capacity ; and it was proved by the payment of interest from time to time, and the settlement of accounts between the rector and the church, that the corporation had recognised the debt as due by itself ; it was held, that though the corporation might not be liable on the note, it certainly was upon the money-counts.² And where the officers of a bank have been in the practice of receiving money and other things to be deposited in its vaults for safe keeping, the corporation impliedly adopting the acts of its officers will be considered as the depository, and not the cashier or other agent, through whose particular act the articles deposited may have been received into the bank.³ Indeed by the whole course of decisions in this country, corporations in their contracts are placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions.

2. Banks, or indeed any other bodies corporate, may as well make contracts of bailment of every kind, as natural persons ; provided it be done in the course of business permitted or contemplated by their charters. Incorporated stage coach companies

¹ *The Proprietors of the Canal Bridge v. Gordon*, 1 Pick. (Mass.) R. 297.

² *The Episcopal Charitable Society v. The Episcopal Church in Dedham*, 1 Pick. (Mass.) R. 372.

³ *Foster et al. v. Essex Bank*, 17 Mass. R. 479 ; and see *Salem Bank v. Gloucester Bank*, 17 Mass. R. 1.

may be liable as common carriers ; and banks sue every day as lenders, and are sued as depositaries, borrowers, &c.

It is not necessary, that the act of incorporation should give a bank particular power to receive deposits, to enable it so to do. It is sufficient, that this is in the ordinary course of banking business ; and such a corporation, by the mere grant of a charter for that species of business, is empowered to do it in all its branches, unless expressly restrained. And although there is not any regulation or by-law relative to deposits, or any account of them required to be kept and laid before the directors and the company, or practice of examining them ; yet if it is found, that the bank has been in the habit of receiving money and other valuable things in this way, and the practice was known to the directors, and might be presumed to have been known to the company ; their building and vaults allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited ; the corporation must be considered the depositary, and not the cashier or other officer, through whose particular agency commodities may have been received into the bank.¹

Banks are frequently restrained by statute as to their mode of contracting ; and such a statute is, of course, applied to a contract of deposit, as well as to any other. In Massachusetts a statute provides “ that no bank shall make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, except for money borrowed of the Commonwealth, &c ; ”² and where upon the deposit of money in a bank, the depositor received a book containing the cashier’s certificate, in which it was stated that the money was to remain in deposit for a time certain, the agreement was, under the statute, deemed to be illegal, as a contract by the bank for the payment of money at a future day certain ; and it was held, that the depositor could maintain no action against the bank *on the contract*, though he

¹ Foster, et al. Ex’ors. v. The Essex Bank, 17 Mass. R. 497, 498, per Parker, C. J.

² Rev. Stat. Mass. c. 36, § 57.

might recover back the amount deposited in an action commenced without previous demand, before the expiration of the time for which it was to remain in deposit, the parties not being *in pari delicto*, and the action being in disaffirmance of an illegal contract.¹

When a deposit is made in bank, it is usual for the cashier to give a certificate to that effect, and from this may be gathered the nature of the deposit, whether it be general or special, or in other words, whether it be generally passed to the credit of the depositor, or specially lodged for *safe keeping* merely.² In the former case, banks are authorized to use in discounting, &c., the money deposited, as a temporary loan, liable to be withdrawn at any moment by the depositor, the deposit being a debt due from the bank to the depositor, which raises an implied assumpsit for its repayment,³ and in the latter, it is considered that they have no such right.⁴ It is not the practice for cashiers to make any return or statement of *special* deposits to the directors of banks; and it is considered highly improper for any officer even to inspect or examine them, without the consent of the depositor. No control whatever of a chest, or of the gold contained in it, when specially deposited, is left with the bank or its officers; and it would be a breach of trust in them to open it, or inspect its contents.⁵ No profit, therefore, can arise to a bank from special deposits, unless it be, that an increased, though it is evident, a fallacious credit, is acquired with the community on their account. Indeed, they are simply gratuitous on the part of the corporation, and the practice of receiving them, must have originated in a willingness to accommodate members with a place for their treasures, more secure from fire and thieves, than their

¹ *White v. Franklin Bank*, 22 Pick. (Mass.) R. 181.

² *Foster et al. Ex'ors. v. The Essex Bank*, 17 Mass. R. 504, 505, per Parker, C. J.

³ *Bank of Kentucky v. Wister*, 2 Peters, R. 324; *State Bank v. Armstrong*, 3 Dev. (N. C.) R. 526; *State Bank v. Locke and Trotter*, *Ibid.* 533, 534; *State Bank v. Kain*, 1 Bre. (Ill.) R. 45; *Albany Commercial Bank v. Hughes*, 17 Wend. (N. Y.) R. 94.

⁴ *Foster et al. Ex'ors., v. The Essex Bank*, 17 Mass. R. 503 - 505.

⁵ *Ibid.* 504, 506.

dwelling houses or stores ; and this is rendered more probable from the well known fact, that not only money or bullion, but documents, obligations, certificates of public stocks, wills, and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe keeping.¹

Although, as a general rule, particular errors in balanced accounts may be inquired into and rectified, though the whole accounts may not be liable to be opened ; with respect to accounts kept by individuals with a bank, it was said by the learned Mr. Justice Spencer, that there was in his mind this exception ; that "if a dealer's book *accompany* the deposit, and the credit be then given, when the deposit is made, it becomes an original entry, and would be conclusive on the bank ; if, however, the book is sent to *be written up afterwards*, (by copying from the bank ledger,) it is not an original entry, and may be examined into."² In the subsequent case of the Mechanics and Farmers Bank v. Smith,³ it was decided by the Supreme Court of New York, that an entry by the teller of the amount of deposit in the bank book of the depositor was not conclusive on the latter ; but that if mistake could be shown as to the amount, there was a remedy as in ordinary cases of mistake. It has been held that a bank assumes on itself a note deposited for collection, by passing the same to the credit of the depositor.⁴ Although the extension of bills of exchange deposited for collection in the books of the bank, and in the bank book of the depositor, is equivalent to payment, or actual collection of the bills, yet if made under mutual mistake, the bank is not bound by it, and frequent settlements of the depositor's bank book previous to the discovery of the mistake, in which the bills were credited to him as paid, was held not to alter the rights of the parties.⁵ A bank may retain from an insolvent depositor any debt due from him to it.⁶

¹ Ibid. 506, 507.

² Manhattan Company v. Lydig, 4 Johns. (N. Y.) R. 369.

³ 19 Johns. (N. Y.) R. 115.

⁴ Witherell v. Bank of Pennsylvania, 1 Miles, (Penn.) R. 399.

⁵ The Mechanics Bank v. Earp, 4 Rawle, (Penn.) R. 384.

⁶ Ford v. Thornton, 3 Leigh, (Va.) R. 695 ; State Bank v. Armstrong, 3 Dev. (N. C.) R. 519 ; McDowell v. Bank, 1 Harrington, (Del.) R. 369.

Where one, having made a *general* deposit in a bank, of a large amount of its bills, which were depreciated to half their nominal value, received from the cashier a certificate that so many *dollars and cents* were deposited, the nominal amount of the bills; the bills of the bank being by its charter redeemable in gold and silver, it was decided by the Supreme Court of the United States, that the depositor was entitled to receive the whole amount of the certificate *in gold and silver*.¹

A wife was entrusted by her husband with certain sums of money, and directed by him to deposit them in some bank for safe keeping, which she did, opening an account with the bank, the officers of which were ignorant of her coverture, in her own name, and from time to time, checked out the whole amount there deposited. In an action brought by the husband against the bank, to recover the amount of the deposit, he was not allowed to recover, on the ground that the wife, as his agent, might fairly be presumed to have authority to withdraw the deposit; and that if this were otherwise, as the bank had no notice of the agent's coverture, and the husband, by entrusting her with the money, had enabled her to do the wrong, the loss should fall upon him rather than upon the bank.²

And where by the negligence of the officers and agents of a canal corporation, the corporate funds were deposited in a bank in such a manner as to lead the officers of the bank to suppose that the deposit was made by the President of the canal company, who at the same time left his signature in the bank as that upon which the money was to be drawn out, and the officers of the bank afterwards paid out the money upon his check, under the supposition that he had authority to draw for the same, the bank was adjudged not to be liable for the loss sustained by the canal company from the misapplication of the deposit by the President.³

It is apparent, that very numerous and important questions may

¹ Bank of Kentucky v. Wister et al., 2 Peters, R. 318.

² Dacy v. Chemical Bank, 2 Hall, (N. Y.) R. 550.

³ Fulton Bank v. N. Y. and Sharon Canal Co., 4 Paige, (N. Y.) Ch. R. 127.

arise, as to how far corporations are liable as bailees for the loss of, or any injury to, the thing bailed, and how far for the neglects, frauds, embezzlements, and thefts of their servants, as cashiers of banks, &c. The solution of these must depend upon the general principles of the law of Bailments, which apply equally to corporations as to natural persons ;¹ and these it would be evidently improper to notice in detail, in a treatise upon the subject we are considering. The liability of a corporation as bailee is, like that of a natural person, to be determined by the nature of the bailment, — the degree of care required from it, and the degree of care or diligence used. In case of a *special* deposit, from which it receives no profit whatever, but which is merely for the accommodation of the bailor, a bank is liable only for *gross* neglect, equivalent, in its effects upon contracts, to fraud.²

In *Foster and others, Executors, v. The Essex Bank*,³ a case which appears to have been very fully and learnedly argued by counsel, and examined by the court, this subject came under the consideration of the Supreme Court of Massachusetts. That was *assumpsit* brought against a bank, to recover the amount of a large special deposit in gold, which had been fraudulently or feloniously taken from the vaults of the bank by its cashier and chief clerk, and converted by them to their own uses. There being no evidence of gross neglect on the part of the bank, — the directors, who represented the company, being wholly ignorant of the nature or amount of the deposit, or of the transactions of the cashier and chief clerk, and these, having no right, *in the course of their official employment*, to intermeddle with the deposit, except to close the doors of the vault upon it, when banking hours were over ; it was adjudged, that the bank was not liable for the loss ; inasmuch as it only warranted the skill and faithfulness of its officers *in their employments*, and not their *general* honesty and uprightness. It was said, “ that the bank was no more liable

¹ *Foster et al. Ex'ors. v. The Essex Bank*, 17 Mass. R. 496, onwards, and see Chap. IX.

² *Foster, &c. ut supra*, 507.

³ *Ibid.* 479.

for this act of his (the cashier's) than they would be, if he had stolen the pocket-book of any person, who might have laid it upon the desk, while he was transacting some business at the bank."¹ The general rule laid down was, that fraud on property deposited, committed by the depositary or his servants acting under his authority, express or implied, relative to the subject matter of the fraud, is equivalent to gross negligence, and renders the depositary liable.² It should be recollected, that because one is employed generally as the agent or servant of a bank, it does not follow, that a dealer with the bank may not, by trust reposed in him in a particular transaction, make him his own agent, and be burthened with any loss which may follow his neglect or fraud in the business confided to him. In *Manhattan Company v. Lydig*,³ it was considered, that where one who was usually employed by a bank as a book-keeper, though occasionally as teller, was entrusted by a dealer with deposits to be lodged in bank for him, and falsely obtained for the dealer credits beyond the amount deposited; that the latter, and not the bank, were liable for the deficit of deposits; inasmuch as the fraud was committed by *his* agent in discharge of *his* trust. A bank cannot be charged with negligence in not detecting the frauds of its servants, if the examinations of books, papers, &c. are in the way usual with banks.⁴ A bank is bound to exhibit its books to a depositor, on proper occasions, and the officers having charge of them are *quoad hoc* the agents of both parties.⁵

3. The reasonable and established customs of banks enter into and make a part of contracts made with them, and must have due weight in expounding their contracts, when knowledge of customs can in any way be brought home to those sought to be affected by them.⁶ Where a note was made payable at a bank,

¹ Ibid. 511.

² Ibid. 508.

³ 4 Johns. (N. Y.) R. 377.

⁴ Ibid. 389.

⁵ *Union Bank v. Knapp*, 3 Pick. (Mass.) R. 96.

⁶ *Jones v. Fales*, 4 Mass. R. 252; *Widgery v. Munroe*, 6 Mass. R. 450; *Lincoln & Kennebec Bank v. Page*, 9 Mass. R. 155; *Same v. Hammatt*, ib. 159;

it was held that the parties were bound to know its usages, and had impliedly agreed that those usages should become a part of their contract.¹ This doctrine was afterwards adjudged to be applicable to the parties to a bill of exchange drawn on a person at Washington, on the ground that it would probably be put into a bank there for collection.² A custom of a bank not to correct mistakes in the receipt or payment of money, unless discovered before the person leaves the room, is however illegal and void.³ A custom of a bank to pay only half of a half bank note, has also been held to be bad as unsupported by law.⁴

It has been decided in Tennessee,⁵ that the law presumes that all persons getting accommodations at a bank are cognizant of all provisions of its charter which fix the law of the contract.

4. A very large portion of the business of banking corporations consists in the collection of debts in the shape of notes and drafts; and we need hardly say, that the law applicable to such agents in general applies equally to them. Where a bank in which a note is deposited for collection places it in a notary's hands, on the party's failure to pay, and the notary omits to give notice to the indorser, so that he is discharged, the bank is not liable to the holder, although the maker is unable to pay.⁶ But if the bank, contrary to cus-

Smith v. Whiting, 12 Mass. R. 8; Blanchard v. Hilliard, 11 Mass. R. 88; Weld v. Gorham, 10 Mass. R. 866; Whitwell v. Johnson, 17 Mass. R. 452; City Bank v. Cutter, 3 Pick. (Mass.) R. 414; Yeaton v. Bank of Alexandria, 5 Cranch, R. 52; Morgan v. Bank of North America, 8 Serg. & Rawle, (Penn.) R. 73; Pearson v. Bank of Metropolis, 1 Peters, R. 93; Bank of Columbia v. McGruder, 6 Har. & Johns. (Md.) R. 180; Bank of Columbia v. Fitzhugh, 1 Har. & Gill. (Md.) R. 239; Hartford Bank v. Stedman, 3 Conn. R. 489; Raborg v. Bank of Columbia, 1 Har. & Gill. (Md.) R. 231; Peirce v. Butler, 14 Mass. R. 303; Renner v. Bank of Columbia. 9 Wheat. R. 585.

¹ Mills v. Bank of the United States, 11 Wheat. R. 431.

² Bank of Washington v. Triplett, 1 Peters, R. 25. See also Whitwell v. Johnson, 17 Mass. R. 452.

³ Gallatin v. Bradford, 1 Bibb. (Ken.) R. 209.

⁴ Allen v. State Bank, 1 Dev. & Bat. (N. C.) R. 3.

⁵ Hays et al. v. State Bank, Martin & Yergers R. 179.

⁶ Bellemine v. Bank of United States, 1 Miles, (Penn.) R. 173.

tom, does not employ a *notary* in such case, but employs some other person as agent, and such person omits to give notice, the bank is liable.¹ By failing to demand a note or bill left with it for collection, a bank makes the note or bill its own, and becomes liable to the owner for the amount.² In such case the debtor's insolvency may be shown in mitigation of damages.³ A bank, in which bills of exchange are deposited for transmission only, fulfils its duty by sending them to the bank to which they are to be transmitted for collection, and is not responsible for any laches of that bank.⁴ A bank that collects a bill of exchange, on its being transmitted by the cashier of another bank, where it was lodged for collection, is liable to the owner, and cannot set off a claim against the bank from which the bill was received.⁵

5. A very important class of cases, in which the doctrine of presumed assent has been applied to corporations aggregate, is in the acceptance of official bonds, grants, &c. In case of an individual, there has never been a question but that a paper, intended for his benefit and found in his possession, would be considered as accepted by him, his assent thereto being presumed. A different rule was thought applicable to corporations, or their managing boards; and that, inasmuch as they ordinarily express their assent by vote, a vote entered on the corporation books was the only mode by which it could be proved. In the *Bank of the United States v. Dandridge*,⁶ this subject was brought under the consideration of the Supreme Court of the United States; and upon great deliberation, and a full review of all the authorities, it was there decided, that a bond with sureties given by the cashier

¹ Ibid.

² *Bank of Washington v. Triplett*, 1 Peters, R. 25; *S. P. McKinster v. Bank of Utica*, 9 Wend. (N. Y.) R. 46.

³ *Stone v. Bank*, 3 Dev. (N. C.) R. 408.

⁴ *Mechanics Bank v. Earp*, 4 Rawle, (Penn.) 384.

⁵ *Lawrence v. Stonington Bank*, 6 Conn. R. 521.

⁶ 12 Wheat. R. 64; *S. P. Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 335; *S. P. Union Bank of Maryland v. Ridgeley*, 1 Harris & Gills, (Md.) R. 324; and see *Apthorp Treas. v. North et al.*, 14 Mass. R. 167; *Smith et al. v. Governor and Company of the Bank of Scotland*, 1 Dow, Parl. R. 272; *Lord Redesdale*.

of a bank for the faithful performance of his duties, and found in the possession of the bank, the cashier having acted in his office, might, as in case of natural persons, be presumed to be accepted by the bank, although no vote of acceptance by the directors could be found on the records of the corporation. It is indeed the well settled doctrine of the present day, that the same presumptions are applicable to a corporation as to a natural person. There is no reason why its assent to, and acceptance of, grants and deeds beneficial to it, should not be inferred from its acts, as well as that the same inference should be drawn from the acts of individuals. "Suppose," says Mr. Justice Story, in the very full and learned opinion delivered by him in the case just mentioned, "a deed poll granting lands to a corporation; can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law; or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents, be justly admitted by implication, to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode by which it is proved. It is no implied condition, that the corporation shall perpetuate the evidence of its assent in a particular way."¹

§ 10. Where the charter of a corporation prescribes the particular mode in which its contracts shall be made, that mode must in general be pursued. Hence where an act incorporating an insurance company provided, that all policies and other instruments, made and signed by the president or any other officer of the company, should be good and effectual to bind the company, it was held that a contract to cancel a policy must be signed by the

¹ Bank of U. S. v. Dandridge, 12 Wheat. R. 70, 72, 73; The Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. R. 159.

president or other officer in order to bind the corporation.¹ But though the charter of an insurance company requires, that all policies shall be signed by the president, yet it is not necessary that the assent of the company to an *assignment* of a policy should be signed by the president in order to bind the company.² The signature of the secretary to such assignment is *prima facie* evidence of an agreement by the company; and the company by accepting the assignee's guaranty of the premium note, adopts the act of the secretary, assenting in their behalf to the assignment.³ It seems to have been held in Connecticut, that a corporation, authorized to contract in a prescribed mode, may nevertheless by practice render itself liable on instruments executed in a different mode, the charter being held, of course, directory only.⁴ And though the charter of a bank enacted "that all bills, bonds, notes, and every other contract or engagement, on behalf of the corporation, should be signed by the president, and countersigned by the cashier; and that the funds of the corporation should in no case be liable for any contract or engagement, unless the same should be signed and countersigned as aforesaid," it was held, that this section did not extend to contracts and undertakings implied in law; so that a recovery was had against the bank for money, advanced upon a check made in the course of business and signed by the cashier only.⁵ An act establishing a State bank made it the duty of the board of directors to protest notes in cases of nonpayment; the clause was considered to be inserted merely for the safety and direction of the bank, and the debtors

¹ *Head v. Providence Insurance Company*, 2 Cranch, 127; *S. P. 2 Johns*. (N. Y.) R. 109; *Dawes v. North River Insurance Company*, 7 Cowen, (N. Y.) R. 462; and see *Hill v. Manchester Water Works Co.*, 2 Nev. & M. 583; 5 Barn. & Adolph. 866. An act which is an attempt to evade the provisions of a charter confers no right on him who attempts it. *Union Bank v. McDonough et al.*, 5 Louisiana R. 63.

² *New England Marine Insurance Company v. D'Wolf*, 8 Pick. (Mass.) R. 56.

³ *Ibid.*

⁴ *Bulkley v. The Derby Fishing Company*, 2 Conn. R. 254; *Witte v. Same*, *Ibid.* 260.

⁵ *Mechanics Bank of Alexandria v. Bank of Columbia*, 5 Wheat. R. 326.

of the bank were not allowed to avail themselves of a non-compliance with the provision on the part of the board, in defence to notes on which they were liable as principal debtors.¹

It is not unusual for the charter to prescribe, what species of security shall be taken by a corporation of its officers or agents, for their skill and faithfulness in the performance of their duties, as a bond with *two* sureties ; and the question has been frequently agitated, whether if a different species of security is taken, as a bond with *one* surety, or none, it can be enforced by the corporation. In this particular, the well settled doctrine is, that charters or acts of incorporation are merely directory ; unless they expressly avoid all security taken, other than that prescribed, and that, although neglect of this kind may be culpable on the part of the directors of the company, the security taken may be enforced against him who gave it.²

§ 11. It is of the very essence of a contract, that it be mutual, and of course that there be parties to it ; to be valid, it must also be founded on consideration ; and this may be either an advantage to the promisor, or a disadvantage to the promisee, growing out of the transaction in pursuance of which the contract is made. In an action by an academic corporation for the amount of a subscription, which the defendant with others, though not mutually, had agreed to pay, without stating to whom, for the erection of an academy, the paper having been signed before the corporation was created, although the academy had been built according to the terms of the subscription, it was adjudged by the Supreme Court of Massachusetts, that no recovery could be had, inasmuch as the corporation was not a party to the contract, there was no mutuality among the subscribers, and no consideration was passed, or had been received. "It is," says Mr.

¹ *Moreland & Willis v. The State Bank*, 1 Bre. (Ill.) R. 203.

² *Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle, (Penn.) R. 306 ; and see *Posterne v. Hanson and Hooker*, 2 Saund. 60, a. n. 3 ; *Maleverer v. Redshaw*, 1 Mod. R. 35 ; *Rex v. Loxdale et al.* 1 Burr. R. 447 ; *Peppin v. Cooper*, 2 Barn. & Ald. 431 ; *Austen v. Howard*, 2 Mar. 352.

Chief Justice Sewall, "a promise to give, connected with a similar promise by others to give to the same appropriation and purpose; but these promises are not mutual among the subscribers. At most it was a donation to come into operation at the will of each subscriber, which *has not been confirmed by any act of the party charged.*"¹ It was considered, however, in this case, that if a subscriber had been named or descriptively included in the grant of incorporation, had been concerned in the subsequent proceedings, and enjoyed the advantages of a member of the corporation, that body would have been entitled to the benefit of his subscription, and the subscriber liable upon an implied promise.² And where in addition to his subscription before incorporation, for the building of an academy, (the amount to be paid by the terms of the paper to any persons, who should be appointed trustees by the legislature,) the defendant, after the incorporation and the appointment of the trustees, delivered, on account of the sum he had subscribed, some shingles to be used in the building; this was adjudged a sufficient recognition of the promise; and the corporation recovered on the money counts to the extent of the subscription.³ It is evident too, that if one subscribes to a charitable fund after the incorporation of the body who are its trustees, and the purposes for which the subscription is made are in the process of execution, the funds being needed for and applied to the faithful execution of the trust, he has no defence either upon the ground of want, of mutuality or of consideration.⁴

¹ Trustees of Philips' Limerick Academy v. Davis, 11 Mass. R. 113; and see Boutell v. Cowdin, 9 Mass. R. 254, commented upon and explained in Amherst Academy v. Cowles, 6 Pick. (Mass.) R. 434 - 436, per Parker, C. J.; also Scots Charitable Society v. Shaw, Admr. 8 Mass. R. 532; Trustees of Bridgewater Academy v. Gilbert, 2 Pick. (Mass.) R. 579; Bluehill Academy v. Witham, 13 Maine R. 403.

² Trustees of Philips' Limerick Academy v. Davis, 11 Mass. R. 118, 119, per Sewall, C. J.

³ Trustees of Farmington Academy v. Allen, 14 Mass. R. 172; and see Homes, et al. Admr. v. Dana, 12 Mass. R. 190.

⁴ Amherst Academy v. Cowles, 6 Pick. (Mass.) R. 427; First Religious Society in Whitestown v. Stone, 7 Johns. (N. Y.) R. 112.

§ 12. Having treated of *the mode* in which incorporated companies may contract, with whom, and in what name, we come now to consider what contracts in general they may make. And here we would observe that a corporation and an individual stand upon very different footing. The latter, existing for the *general* good of society, may do all acts and make all contracts, which are not, in the eye of the law, inconsistent with this great purpose of his creation ; whereas, the former, having been created for a *specific* purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary either directly or incidentally to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract ; and if the charter and valid statutory law are silent upon the subject, in the second place, whether a power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose. These principles are very obvious ; the difficulty, if any, lies in the application of them.

In general an express authority is not indispensable to confer upon a corporation the right to become drawer, indorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper.¹ It is sufficient if it be implied as the usual and proper means to accomplish the purposes of the charter.² Corporations are expressly mentioned in the statute of Ann, respecting promissory notes, as persons who make and indorse negotiable notes, and to whom such notes may be made payable ; and as corporations and others have by the statute a like remedy upon notes as upon inland bills of exchange, it implies, that, by

¹ Chitty on Bills, (5th ed.) 17 to 21 ; Bayley on Bills, ch. 2, § 7, p. 69, 70, (5th ed.) ; Story on Bills of Exchange, § 79, p. 94.

² Broughton v. The Manchester Water Works Company, 3 Barn. & Ald. 1 to 12 ; Munn v. Commission Co. 15 Johns. (N. Y.) R. 44.

the custom of merchants they may, in some cases at least, draw, indorse, accept, or sue upon bills of exchange.¹ Where, however, the drawing, indorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, there the act becomes a nullity, and not binding upon the corporation.²

In New York, where an insurance company had power by their act of incorporation to insure buildings and personal property against fire, "to make all kinds of marine insurance, and to loan money on bottomry, respondentia, or mortgage of real estate or chattels real," provided that nothing in the act contained should in any way be construed into a grant of *banking powers*; in an action by the company as endorsee of a promissory note, which it had *discounted*, it was held, that the note was void as received by the corporation in the course of a transaction impliedly forbidden, as a banking transaction, by its charter, and also as contrary to the *restraining act* of the State.³ Where it was provided in the charter of a corporation established for loaning money, that "nothing therein contained should be construed to authorize the company to discount notes, or exercise any banking privileges whatever," the taking of a note for the sum loaned and receiving the interest in advance, was held to be thereby prohibited, and that there could be no recovery on the note thus discounted.⁴ And where such a corporation received goods of the defendant as security for money loaned, which goods were not pledged or disposed of in the manner required by charter, it was decided, that in an action for the money loaned the defendant could not set off the value of such goods, as goods sold and delivered.⁵ The taking of a note as security in contravention of the provis-

¹ Bayley on Bills, § 2, l. 9, p. 60, 68, (5th ed.); Kyd on Bills, p. 19, 20; Story on Bills of Exchange, § 79, p. 95.

² Broughton v. Manchester Water Works Co. 3 Barn. & Ald. 1 to 12; Chitty on Bills, p. 17; Story on Bills of Exchange, § 79, p. 95.

³ N. Y. Firemen Ins. Co. v. Ely, 2 Cowen, (N. Y.) R. 664; and see 5 Conn. R. 569; Lane v. Bennett, 5 Conn. R. 574.

⁴ Philadelphia Loan Company v. Towner et al. 13 Conn. R. 249.

⁵ Ibid.

ions of the charter did not, however, prevent a recovery by the corporation of the amount loaned on the money counts.¹

An insurance company of Alexandria was by its act of incorporation limited in the performance of its functions *to the bounds of the State of Virginia*; upon the separation of Alexandria from the State of Virginia, it seems that the company could make no *new contracts* of insurance until it had received additional powers;² although it was held by the Supreme Court of the United States, that such separation could have no effect upon the existing contracts of individuals.³ And it may well be questioned, since a corporation can make such contracts only as are allowed by its act of incorporation, whether it has power to make a contract, which should so operate as to bind its legislative capacities forever thereafter, and disable it from making a by-law, which the legislature enables it to enact.⁴ Upon this principle it was held, where a statute authorized a corporation of a city to make by-laws "regulating," or if found necessary, "*preventing the interment of the dead*" within the limits of the city, though it had granted lands for the purpose of interment, and had covenanted that they should be quietly enjoyed for that purpose, yet that the corporation was not estopped by its contract from passing a by-law forbidding such interment under a penalty.⁵ It should be remarked, however, that both the cases last cited were concerning municipal corporations, empowered for direct public benefit. In *Little v. O'Brien*,⁶ it was objected to the recovery on a note given for a balance of instalments due from the defendant, as one of the stockholders in an insurance company, that the act incorporating that company required that the capital stock should, within six months after payment, be invested in certain

¹ Ibid.

² *Korn v. Mu. As. So.* 6 Cranch, 199, per Johns. J.

³ Ibid.

⁴ *Gozzler v. Corp. of Georgetown*, 6 Wheat. R. 593. per Marshall, C. J.

⁵ *Presbyterian Church v. City of N. Y.* 5 Cowen, (N. Y.) R. 538; *Coates v. Mayor, &c. of N. Y.* 7 Cowen, (N. Y.) R. 604.

⁶ 9 Mass. R. 423.

designated stocks ; whereas instead of such investment, it appeared that the company received of the several stockholders their respective promissory notes, with collateral security for the payment thereof, one of which, this was. It was here said by the court, that whether for this misbehavior of the corporation the government might not seize their franchises, upon due process, was a question not before them ; but that it did not "lie in the mouth of a stockholder for this cause to avoid his contract, which, as between him and the company, was made on sufficient consideration." To discount notes payable in a certain species of paper money, and upon renewal to take a premium of one per cent, as the difference between that and other money ;¹ or to discount notes at the usual percentage, with an agreement on the part of the borrower to redeem with specie the identical bank notes received by him on the loan, if they should be returned to the bank during the continuance of the loan, and also to purchase of the company with specie during the loan, a certain amount of other bank notes not current, at par,² was held not inconsistent with a clause in a banking charter, prohibiting the company from using their moneys, &c., in trade or commerce.

2. And although it is well settled, that legislative acts divesting a corporation of any rights with which it is clothed by charter, as a right to make particular contracts, are void under the constitution of the United States, as impairing the obligation of the charter ;³ yet it is evident, that except so far as privileged by the instrument of their creation, corporations like individuals are subject to legislative action ; and hence all contracts made by them in contravention of the general laws of the land are voidable, or may be void by force of statutory provision. Neither is it necessary, that *corporations eo nomine* should be embraced within the terms of an act, to subject them to its prohibitions ; since it

¹ *Portland Bank v. Storer*, 7 Mass. R. 433.

² *Northampton Bank v. Allen*, 10 Mass. R. 284 ; and see *Fletcher v. United States Bank*, 8 Wheat. R. 349 to 354.

³ *Case of Dartmouth College*, 4 Wheat. 518 ; *Allen v. McKeen*, 1 Sumn. C. C. R. 276.

is well settled, that the words *inhabitants, occupiers, or persons*, may include incorporated companies.¹ In Virginia, it was considered that no recovery could be had upon notes there issued by a banking corporation of another State, through an agency established in Virginia, inasmuch as such banking operations would be contrary to the policy of the statute against unincorporated banking companies; though it was admitted, that notes originally issued by a bank in the state of its incorporation might well be negotiated and enforced in Virginia; and that contracts ancillary to banking operations might legally be made there by such a corporation.² It was by virtue of this last distinction, that the court of chancery in New York, notwithstanding the restraining act, enforced a mortgage, given to a Pennsylvanian banking corporation upon lands in New York, for the security of a loan made in Pennsylvania,³ although banks of other States are within the restraining acts of New York, and cannot recover the amount of a check discounted by them in violation of those statutes.⁴ On an information in the nature of a *quo warranto*, judgement of ouster was rendered against an insurance company in the State of New York for contracting as a bank, contrary to an act of that State, passed to restrain unincorporated banking associations.⁵ The same company having, as endorsee, brought an action against an endorser of a promissory note, *discounted* by the corporation, the note was adjudged void, under that section of the above restraining act, which declares, "that all notes and securities for the payment of money, or the delivery of property, made or given to any

¹ Inst. 703; *Rex v. Gardner*, Cowp. 79; *The Clinton Woollen and Cotton Manuf. Co. v. Morse and Bennett*, (Oct. 7, 1817,) cited in, and see *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 382; *Mott v. Hicks*, 1 Cowen, (N. Y.) R. 513; *United States v. Johns*. 1 Wash. C. C. R. 364.

² *Bank of Marietta v. Stanard*, 2 Randolph, (Va.) R. 465; 5 Randolph, (Va.) R. 329.

³ *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370.

⁴ *Pennington v. Townsend*, 7 Wend. (N. Y.) R. 276; and see *New Hope Delaware Bridge Company v. Poughkeepsie Silk Company*, 25 Wend. (N. Y.) R. 648.

⁵ *People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 358.

such association, institution, or company, not authorized for banking purposes, shall be null and void."¹ It need hardly be added, that such an act cannot be evaded by making the note payable to individuals, the corporation claiming as endorsee.² But though in the above case of *Utica Insurance Company v. Scott*, the note by force of the restraining act was adjudged void, and in analogy to the statute of gaming, it was held that it would be so, into whatever hands it might pass; yet, say the court, "there is a material distinction between the security and contract of lending. The lending of money is not declared void, and therefore, wherever money has been lent, it may be recovered, although the security itself is void."³ This distinction between the security and the contract in cases falling under the restraining acts seems to be much shaken in New York by the later authorities; and the contract, as well as the security, would probably now be adjudged void.⁴

These cases by no means decide that an insurance company cannot receive a promissory note, but only that notes or securities of any kind, received by the corporation in the course of banking transactions, as the discounting of notes for the deducted interest, are void by force of the express provision of a statute. On the contrary, an insurance company, has power to take notes for premiums as incidental to its proper business of insurance; and in the case of the *New York Firemen Insurance Company v.*

¹ *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) R. 1; *Same v. Hunt and Brooks*, 1 Wend. (N. Y.) R. 56; *Same v. Cadwell*, 3 Wend. (N. Y.) R. 296; see, too, *N. Y. Firemen Ins. Co. v. Ely*, 2 Cowen, (N. Y.) R. 678; *Same v. Sturges*, 2 Cöwen, (N. Y.) R. 664.

² *New York Firemen Ins. Co. v. Ely*, sup., per Savage, C. J., et ead. auc.

³ *Utica Ins. Co. v. Scott*, sup.; *Same v. Kip*, 8 Cowen. (N. Y.) R. 20; *Philadelphia Loan Company v. Towner et al.* 13 Conn. R. 249; and see *Hussey v. Jacob*, 1 Com. R. 4; *Bowyer v. Bampton*, 2 Stra. 1155; *Barjeau v. Walmsley*, 2 Stra. 1249; *Robinson v. Bland*, 2 Burr, 1080.

⁴ *Beach v. Fulton Bank*, 3 Wend. (N. Y.) R. 573; *North River Insurance Co. v. Lawrence*, 3 Wend. (N. Y.) R. 482; 2 Conn. R. 678; *Life and Fire Insurance Co. v. Mechanic Fire Insurance Co.* 7 Wend. (N. Y.) R. 31; *New Hope Delaware Bridge Company v. Poughkeepsie Silk Company*, 25 Wend. (N. Y.) R. 648, where find old authorities doubted.

Sturges,¹ which was an action by the corporation as endorsee against an endorser of a promissory note, given in renewal of one discounted by the corporation, the proceeds to be, and in fact, applied to the payment of a debt due by note to it for premiums ; though it appeared that twenty dollars, the excess of the note discounted over the premium note taken up, was paid to the promissors, yet it was held that the corporation might recover, notwithstanding the restraining act ; inasmuch as it was a transaction in the course of its proper business of insurance ; the small amount urged as a discount on the funds of the institution, which might be accidental, forbidding the conclusion that it was a business transaction of borrowing and lending.

If a corporation is authorized to raise money on promissory notes for a particular purpose, or if, as is frequently the case with other than banking institutions, it may receive notes in the course of its proper business, evidence may be admitted in the one case in favor,² and in the other against the corporation,³ to impeach the notes, by showing that they were issued for another purpose, or received in the course of business improper, or forbidden to it. As in ordinary cases, *ut res magis valeat, quam pereat*, the presumption is always in favor of the validity of the contract ; or, in other words, it will be presumed that the debt was due, or the note or other security given in the lawful course of business, until the contrary is shown.⁴

In general, illegality of consideration does not avoid a note in the hands of a *bona fide* holder without notice ; and accordingly where the directors of a bank, for the purpose of controlling the election of its officers, entered into an arrangement to purchase on account of the bank a large amount of its stock, at a premium of seven per cent above its par value, and to effect this object

¹ 2 Cowen, (N. Y.) R. 664 ; see too *People v. Brewster*, 4 Wend. (N. Y.) R. 498.

² *Slark v. Highgate Archway Company*, 5 Taunt. 792.

³ *N. Y. Firemen Ins. Co. v. Sturges* ; and *Same v. Ely*, 2 Cowen, (N. Y.) R. 664 and 678.

⁴ *N. Y. Firemen Ins. Co. v. Sturges* ; and *same v. Ely*, sup. ; *Barker v. Mechanic Fire Insurance Company*, 3 Wend. (N. Y.) R. 94.

paid for the stock to the amount of its par value, with the funds of the bank, transferring the stock in trust for the bank, and for the purpose of paying the premium, each director borrowed money of the bank by causing his own note endorsed to be discounted at the bank ; in an action brought by the bank, upon one of these notes against the endorsers, they were not allowed to set up the illegality of the original transaction as a defence, upon the ground that the bank was to be considered as an innocent third party.¹

In the case of the *Utica Insurance Company v. Scott* ;² we have seen, that it was said by the Supreme Court of the State of New York, that notes or other securities made or given to an association, institution, or company, in the course of unauthorized banking transactions, are void by the terms of their restraining act, even in the hands of an innocent holder ; and that the only remedy is an action for the consideration. In England, the statute 15 G. 2, c. 13, prohibited any body corporate, or any other persons in partnership, exceeding six, from borrowing, owing, or taking up any money on their bills or notes payable at demand, or at any less period than six months from the borrowing ; but did not expressly avoid securities made in contravention of the act. In the case of *Wigan v. Fowler*,³ which was an action by an endorsee against seven persons as acceptors of a bill of exchange, the fact, that the partnership of the acceptors consisted of more than six persons, not appearing on the face of the bill, and at the time of taking the note the plaintiff not being privy to that fact, or that the note was within the prohibition of the statute ; it was held that he might recover upon it. In *Broughton v. The Manchester Water Works Company*,⁴ Holroyd, Justice, in commenting upon this case, observes, that the statute of Geo. II. does not expressly avoid the security ; “ if it did, the bill would (as in case of usury or gaming) be void in the hands of an innocent holder, although

¹ President, Directors, and Company of the City Bank of New York v. Barnard and Marcy, 1 Hall, (N. Y.) R. 70.

² 19 Johns. (N. Y.) R. 6.

³ 1 Starkie, 459.

⁴ 3 Barn. & Ald. 10, per Holroyd, J.

the defect did not appear on the face of the instrument." That¹ was an action by the plaintiffs as endorsees of a bill of exchange accepted by the defendants, and payable at three months from date. The Court of King's Bench distinguished this case from *Wigan v. Fowler* above cited, and held that the plaintiffs could not recover on a bill prohibited by the statute of Geo. II; inasmuch as they were not innocent endorsees, being bound to take notice of the public act of parliament by which the defendants were incorporated, and, being bound to know, therefore, when they received the paper, that it was the acceptance of a corporation prohibited from owing money on such a bill. It seems however to be now considered in England, that taking all the bank acts together, the object of the legislature was to give protection to the Bank of England against rival Banks only; and that they do not prevent merchants from issuing bills short of six months date, though there were more than six partners in the firm, if really not bankers, and the bills were issued only for the purposes of commerce.²

3. When the charter or act of incorporation, and valid statutory law, are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other.³ The creation of a corporation, for a specified purpose, implies a power to use the necessary and usual means to effect that purpose; and though their charters were entirely silent on the sub-

¹ *Broughton et al. v. The Manchester Water Works Co.* 3 Barn. & Ald. 1; see, however, *Slark v. Highgate Archway Co.* 5 Taunt. 792, Gibbs, J.

² *Wigan v. Fowler*, 2 Chitty, R. 128; *Perring v. Dunston*, Ryan & Moody, 426.

³ *Broughton v. Manch. Water Works Co.* 3 Barn. & Ald. 12 per Best, J.; *People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 383, per Thompson, J.; *N. Y. Firemen Ins. Co. v. Ely*, 2 Cowen, (N. Y.) R. 699, per Sutherland, J.; *N. Y. Firemen Ins. Co. v. Ely*, 5 Conn. R. 568, per Hosmer, C. J. Where the proprietors of a toll-bridge were authorized by law to commute toll with any person or corporation, this was held to extend only to such corporations as had a legal capacity to enter into such a contract; *Bussey v. Gilmore*, 3 Greenl. (Me.) R. 191.

ject, banks would necessarily be empowered to issue and discount promissory notes and bills of exchange, and insurance companies to make contracts of indemnity against losses by fire or marine accident, or both, as the case might be. "When," says Mr. Justice Best, "a company like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills, or issue promissory notes; it would be impossible for either of the companies to go on without accepting bills."¹ But where a company was incorporated not for the purposes of trade, but merely to carry on the business of supplying the inhabitants of a particular place with water, it was considered that they could not become the makers of promissory notes, or the acceptors of bills of exchange without express authority; since the nature of the business in which they were engaged did not raise a necessary implication of such a power.² In an action by an insurance company as endorsees against the endorsers of a promissory note, given to the company in renewal of one discounted by them in a mere transaction of borrowing and lending, it was held upon general principle by the Supreme Court of Errors of the State of Connecticut, that the note was void in the hands of the corporation, as received by it in the prosecution of a business unauthorized by its charter.³ On the other hand, where a glass company, not empowered to sell goods generally, sold them to one in their service, upon its being objected that the company was not authorized to keep a store of goods and sell them in the manner they did, and could not; therefore, recover on a count for goods sold and delivered, it was held, that the legislature did not intend to prohibit a supply of goods to those employed in the manufactory, and that the corporation might re-

¹ Broughton v. Manch. Water Works Co. 3 Barn. & Ald. 11, 12; see, too, Edie and another v. East India Co. 2 Burr. 1216; Yarborough v. Bank of England, 16 East, 6; Murray v. East India Co. 5 B. & Ald. 204.

² Broughton v. Manch. Water Works Co. *supra*, per Bayley & Best, J.

³ N. Y. Firemen Ins. Co. v. Ely, 5 Conn. R. 560.

cover for them. "Besides," say the court, "the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused."¹ And where the president of a glass company executed a promissory note in the name of the company, in payment for wood furnished them to use in the manufacture of glass, a recovery was had against the company thereon; it being adjudged, that a corporation could without express authority in its charter give a negotiable promissory note in the course of its legitimate business, as included in the word person used in the statute 3 and 4 Ann.² Upon the same principle it was, that where an incorporated commission company was empowered to employ its stock solely in advancing money, when requested, on goods, and in the sale of such goods on commission, it was held that the company might agree to pay or advance money, at a future day, and that, though not expressly authorized, they might engage to do this by the acceptance of a bill. It was also considered, that it was not necessary that the goods should be delivered to the company prior to their advancing on them; but that they might advance money or accept a bill, *upon an agreement* to deposit or consign goods.³ Two or more corporations cannot consolidate their funds, or enter into a copartnership, unless authorized by express grant or necessary implication.⁴ And where two corporations are created by adjacent States with the same name, for the construction of a canal in both States, and are afterwards united by the legislative acts of both States, this does not merge the separate corporate existence of such corporations, but only creates an unity of stock and interest.⁵

In the *Trustees of Amherst Academy v. Cowles*,⁶ an academy incorporated "to promote morality, piety, and religion, and for the instruction of youth in the learned languages, and in such

¹ *Chester Glass Co. v. Dewey*, 16 Mass. R. 102.

² *Mott v. Hicks*, 1 Cowen. (N. Y.) R. 513.

³ *Munn v. Commission Comp.* 15 Johns. (N. Y.) R. 44.

⁴ *Sharon Canal Company v. Fulton Bank*, 7 Wend. (N. Y.) R. 412.

⁵ *Farnum v. Blackstone Canal Corporation*, 1 Sumner, C. C. R. 47.

⁶ 3 Pick. (Mass.) R. 427.

arts and sciences as are usually taught in other academies,"— with power to apply property already given, or which might thereafter be given to the above purposes, the income thereof not to exceed five thousand dollars, was held capable of procuring subscriptions and taking promissory notes to constitute a fund for the purpose of founding an institution, "for the classical or academical and collegiate education of indigent young men, with the sole view to the Christian ministry," to be incorporated with the academy. It was further decided in this case, that an assignment by the trustees of the academy of such promissory notes, to a college incorporated distinct from the academy, but by its charter authorized to receive, and required to appropriate the fund in question according to the will of the donors, was valid; and, that an action upon a negotiable note given as above, and assigned by deed to the college but not endorsed, was rightly brought in the name of the trustees of the academy.

4. We have before seen that corporations, as banks, of one State cannot issue notes or bills, or exercise banking privileges in another State, in violation of its restraining acts, or settled law prohibitory of such contracts or acts. In the recent case of the *Bank of Augusta v. Earle*, the very important question of the general right of a corporation to make contracts in another State than that of its creation, underwent a thorough examination by the highest judicial tribunal of the country, and the result was declared in the very able and satisfactory opinion, delivered by the Chief Justice of the Supreme Court of the United States. That was an action brought by the plaintiffs, a banking corporation incorporated by the Legislature of the State of Georgia, and empowered amongst other things to purchase bills of exchange, against the defendant, a citizen of the State of Alabama. on a bill of exchange drawn and endorsed in Mobile, Alabama, The bill was drawn for the purpose of being discounted by the agent of the bank, who had funds of the bank for the purpose of purchasing bills, derived from bills and notes discounted in Georgia by the bank, and payable in Mobile, with which funds the agent of the bank did discount and purchase the bill sued on, at Mobile, for the bank. It was contended that the contract was void,

and did not bind the defendant to the payment of the bill, on the general ground, that a bank incorporated by the laws of Georgia could not lawfully exercise the power of discounting bills in the State of Alabama, and this ground was sustained by the decision of the Circuit Court, before whom the case was first tried.¹ The Supreme Court of the United States reversed the decision in this and two similar cases,² decided in the same way by the Circuit Court; and the Chief Justice in delivering the opinion of the Court thus treats the question.

“It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognised as such by the decisions of this Court. It was so held in the case of *The United States v. Amedy*,³ and in *Beaston v. The Farmers Bank of Delaware*.⁴ Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity

¹ 13 Peters, R. 521.

² *Bank of United States v. Primrose*, and *New Orleans and Carrollton Rail Road Company v. Earle*, 13 Peters, R. 521; and see *The Commercial and Rail Road Bank of Vicksburgh v. Slocumb et al.*, 14 Peters, R. 60; *S. P. Irvine for the use of the Lumberman's Bank v. Lowry*, 14 Peters, R. 393; *Runyan v. Coster*, 14 Peters, R. 122.

³ 11 Wheat. R. 412.

⁴ 12 Peters, R. 135.

of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside ; provided such contracts are permitted to be made by them by the laws of the place ?

“ The corporation must no doubt show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the State of its creation, is acknowledged and recognised by the law of the nation where the dealing takes place ; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

“ Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised ; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed ; whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognised and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples ; and Courts of justice have always expounded and executed them, according to the laws of the place in which they were made ; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered ; and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story’s *Conflict of Laws*, 37,

that ' In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government ; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.'

" Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction ; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its Courts ; since the case *Henriquez v. The Dutch West India Company*, decided in 1729.¹ And it is a matter of history, which this Court are bound to notice, that corporations, created in this country, have been in the open practice for many years past, of making contracts in England of various kinds, and to very large amounts ; and we have never seen a doubt suggested there of the validity of these contracts, by any Court or any jurist. It is impossible to imagine that any Court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England ; yet if the contracts of corporations made out of the State by which they were created are void, even contracts of that description could not be enforced.

" It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union ; that they extend to one another no other rights than those which

¹ 2 *Ld. Raymond*, 1532.

are given by the Constitution of the United States ; and that the Courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence ; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The Court think otherwise. The intimate union of these States, as members of the same great political family ; the deep and vital interests which bind them so closely together should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these States ? They are sovereign States ; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other, the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established in different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the Court cannot overlook them, when a question like the one before us is under consideration. The silence of the State authorities, while these events are passing before them, shows their assent to the ordinary laws of comity which permit a corporation to make contracts in another State. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unneces-

sary to recapitulate in this opinion; that it has been decided in many of the State Courts, we believe in all of them where the question has arisen, that a corporation of one State may sue in the Courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the Courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power; why should not its existence be recognised for other purposes, and the corporation permitted to exercise another power, which is given to it by the same law and the same sovereignty; where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied."

The Court finding that the State of Alabama had not merely acquiesced by silence, but that her judicial tribunals had recognised the comity of suit in favor of corporations of other States, and there being no law prohibiting the contract in question, held that it was valid, and obliged the party to pay according to its tenor and effect. The doctrines of this case had been declared in several of the States, and may now be considered as the law of the land.¹

¹ *Portsmouth Livery Company v. Watson*, 10 Mass. R. 91; *N. Y. Fire Insurance Company v. Ely*, 5 Conn. R. 560; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) R. 465; *Taylor v. Bank of Alexandria*, 5 Rand. (Va.) R. 471; *Williamson v. Smoot*, 7 Martin, (La.) R. 31; *Lathrop v. Bank of Scioto*, 8 Dana, (Ky.) R. 114; *Bank of Edwardsville v. Simpson*, 1 Missouri R. 184; *Guaga Iron Company v. Dawson*, 4 Blackf. (Ind.) R. 202; and see *Henriques v. Dutch W. India Co.* 2 Ld. Raymd. 1532; 8 C. 1 Stra. 612; 2 *Ibid.*

We will close this chapter by observing, that a corporation, keeping within the scope of its general powers, may contract or bind itself to do any act *at any place*, and wherever the engagement may be broken, it will be equally liable.¹

807; *Hallett v. King of Spain*, 1 Dow, R. 169; S. C. 3 Simons, 338; *St. Charles Bank v. De Bernales*, 1 C. & P. 569; R. & M. 190; *Brown v. Minis*, 1 McCord, (S. C.) R. 80; *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370.

¹ *Bank of Utica v. Smedes*, 3 Cowen, (N. Y.) R. 684; *M'Call v. Byram* Man. Co. 6 Conn. R. 420.

CHAPTER IX.

OF AGENTS OF CORPORATIONS, THEIR MODE OF APPOINTMENT AND POWER.

§ 1. IN general the only mode, in which a corporation aggregate can act or contract, is through the intervention of agents, either specially designated by the act of incorporation, or appointed and authorized by the corporation in pursuance of it.¹ It is an old rule of the common law, that such a corporation cannot lay a fine, acknowledge a deed, or appear in a suit, except by attorney or agent;² and corporations with power to sue and be sued perform necessary services incident to such business by agents.³ At the civil law, it was one of the privileges of a corporation (*universitas*) to act by an attorney or agent, who was known by the name of actor, or procurator, or more familiarly, by the name of syndic. *Quibus autem permissum est corpus habere, collegii &c. et actorem, sive syndicum, per quem, tanquam in republica, quod communiter agi fierique oporteat, agatur, fiat.*⁴

The power to appoint officers and agents rests, of course, like every other power, in the body of the corporators, unless some particular board or body, created or existing within the corporation, is legally vested with it. Where the charter or act of incorporation speaks upon this subject, it must be strictly pursued, or the appointment may be avoided. The directors of a corporation, specially empowered by the charter to contract on its behalf, have no power to appoint sub-agents to contract for the corporation, unless such power is expressly given them; and

¹ Co. Lit. 66 b.

² Com. Dig. Attorney C. 2.

³ The Planters & Merchants Bank v. Andrews, 8 Porter, (Ala.) R. 404.

⁴ Dig. Lib. 3, tit. 4, l. 1, § 1; Pothier Pand. Lib. 3, tit. 4, n. 39; Vicat. Vocabul. Syndicus; Heinecc. ad Pand. P. 1, lib. 3, tit. 3, § 419; Id. tit. 4, § 439; Pothier on Oblig. art. 49.

accordingly contracts made by such sub-agents will not be binding on the corporation. Canal commissioners cannot delegate the authority vested in them to enter upon and take possession of lands for canal purposes ; but this must be done by themselves, or under their *express* directions, as in other cases of personal confidence and trust, where judgment and discretion are required, or relied on.¹ And where by a bank charter the power of discounting notes and bills was vested in the board of directors, it was held in Louisiana, that they could not delegate this trust to an agent or agents of the board.² In such case indeed it would be a violation of the charter for which the corporation would be held responsible, for the board of directors to authorize their president or cashier, or any other officer of the bank, to make loans and discounts, without having the same formally passed upon by the board.³ Neither can an agent, appointed by the corporation, and authorized to make a particular contract, or to do a certain piece of business, delegate his trust, unless specially empowered so to do ; the personal confidence of the principal in the agent being the supposed motive of the selection and appointment of the latter. Accordingly, where the directors of a turnpike corporation were empowered by the corporation to contract for the making of the turnpike road, and they, without authority so to do, appointed sub-agents, who covenanted on behalf of the directors to pay certain sums for the making of the road ; it was decided by the Supreme Court of Massachusetts, that the corporation was not bound by the contract, since it had given the directors, its immediate agents, no power to substitute agents under them.⁴

§ 2. 1. Generally speaking, any persons may, by due appointment, be the agents of corporations, as well as of natural persons ; and it is a well established principle, that they even who are dis-

¹ *Lyon v. Jerome*, 26 Wend. (N. Y.) R. 485 ; and see *Rex v. Gravesend*, 4 D. & R. 117 ; 2 B. & C. 602.

² *Percy v. Millauden et al.*, 3 Louisiana R. 568.

³ *Commissioners v. Bank of Buffalo*, 6 Paige, (N. Y.) Ch. R. 497.

⁴ *Tippets v. Walker et al.*, 4 Mass. R. 595 ; *S. P. Emerson et al. v. The Providence Hat Manufacturing Co.*, 12 Mass. R. 237.

qualified to act for themselves, as infants and feme coverts, may yet act as the agents of others.¹ A corporation may employ one of its own members as an agent to act as auctioneer at the sale of its pews, who may make the memorandum of sale required under the statute of frauds to bind the purchaser.²

2. It is not unusual, however, for the charters of banking, insurance, and turnpike companies, to prescribe who, and who alone, shall be the agents of the company for particular purposes; and in such cases, the boards or persons specified, and they alone, for those purposes, are, or can be, the agents of the corporation.³ Such being created agents by the charter, or act of incorporation, the power of appointing others in their stead, by the very law of its nature, never existed in the corporation. These boards, it is true, are elected by the stockholders, but are constituted *agents* of the corporation, and derive all their authority from the charter.⁴ Accordingly, where a member of a Turnpike Company agreed to pay the instalments on his stock, in such manner and proportion as the President, Directors, and Company of the corporation should direct, it was decided that he bound himself to pay according to the order of the President and Directors, since they were the representatives of the corporation, and were by the charter alone authorized to manage its concerns.⁵ And where a statute, incorporating an insurance company, enacted that no losses should be paid without the approbation of at least *four* of the *directors*, with the president and his assistants, upon an attempt being made to charge the company with a total loss, upon a verbal agreement made by the *president* and *assistants* merely, to accept an abandonment, and pay a total loss, at a meeting, when it did not appear that a single *director* was present; the Supreme Court of the State of New York decided, that the acceptance, not

¹ Co. Lit. 52 a; *Emerson v. Blouden*, 1 Esp. Cas. 142; *Paletthorp v. Furnace*, 2 Esp. Cas. 511; *Anderson v. Sanderson*, 2 Stark. Cas. N. P. 204.

² *Stoddert v. Port Tobacco Parish*, 2 Gill. & Johns. (Md.) R. 227.

³ *Washington & Pittsburg Turnpike Company v. Crane & Cullen*, 8 Serg. & Rawle, (Penn.) R. 521, 522.

⁴ *Bank of the United States v. Dandridge*, 12 Wheat. R. 113, per Marshall, Ch. J.

⁵ *Union Turnpike Company v. Jenkins*, 1 Caine, (N. Y.) R. 391.

having been made by the *agents* constituted by the act of incorporation, was not binding on the company.¹ If the charter has invested a particular board, or select body, with power to manage the concerns of the corporation, the body at large have no right to interfere with the doings of these their charter agents ; and courts will not, even upon a petition of a majority of the members, compel the board to do any act contrary to their own judgment.² The directors of a bank are the sole judges of what portion of the profits of the bank they ought from time to time to divide ; and their judgment in such matters will not be controlled by the courts, even though they may deem it honestly erroneous.³ Boards of Directors, Managers, &c., are agents of the corporation, only so far as authorized directly or impliedly by the charter, and the general authority, given by the act incorporating a manufacturing corporation to the directors to manage the stock, property, and affairs of the corporation does not enable them to apply to the legislature for an enlargement of the corporate powers ; and a legislative resolve passed upon such an application without authority from the company is void.⁴ Neither has a board of bank directors any right to pass a resolution, excluding one of its number from an inspection of the bank books upon the ground, that he was hostile to the interests of the bank ; and a mandamus will lie, directed to the cashier, commanding that the books be submitted to the inspection of a director thus excluded.⁵ The directors have, however, in general, power to control all the property of the bank ; and may authorize one of their number to assign any securities belonging to it.⁶ They may authorize the President and Cashier to borrow money or obtain discounts for

¹ *Beatty v. The Marine Ins. Co.* 2 Johns. (N. Y.) R. 109.

² *The Commonwealth v. The Trustees of St. Mary's Church*, 6 Serg. & Rawle, (Penn.) R. 508.

³ *State of Louisiana v. Bank of Louisiana*, 6 Louisiana R. 745. See however *Scott v. Eagle Fire Ins. Co.*, 7 Paige, (N. Y.) Chan. R. 198.

⁴ *Marlborough Manufacturing Company v. Smith*, 2 Cowen, (N. Y.) R. 579.

⁵ *People v. Throop*, 12 Wend. (N. Y.) R. 183.

⁶ *Spear v. Ladd*, 11 Mass. R. 94 ; *Northampton Bank v. Pepoon*, 11 Mass. R. 288.

the use of the bank ;¹ and the power of making discounts, and of fixing the conditions of them, is in general solely with them.² The board of directors of a banking corporation, having passed a resolution authorizing the stockholders to transfer their stock to the bank in payment of their debts to it, several of the stockholders availed themselves of the authority of the resolution, and discharged their debts to the bank in this way. It was decided that the directors had power to pass the resolution, and that the stockholders were legally authorized by it thus to pay their debts to the bank ; and that, notwithstanding the bank had since stopped payment, equity would not compel a resumption of the stock by the stockholders, or compel them to pay their debts with other means.³ The managers or directors of a corporation are not trustees of its property in such a sense, as to disenable them from purchasing the property or stock belonging to it, with the same effect as though they were not managers or directors.⁴ Where, however, the trustees of a religious corporation purchased lands with the corporate funds, and took the deeds in their individual names, it was considered that they held the lands as trustees for the corporation, and that if they subsequently sold the lands, the proceeds belonged to the corporation, and were to be held for its use.⁵

§ 3. 1. According to the doctrine of some of the ancient judges, a corporation aggregate could manifest its assent only by affixing its common seal, and hence could act only by deed.⁶ Some went so far as to assert not only that no servant of a corporation could be appointed without deed, but that without it no command to a servant to do a particular act was valid ; while others admitted that no servant could be appointed without deed,

¹ *Ridgway v. Farmers Bank*, 12 Serg. & Rawle (Penn.) R. 256.

² *Bank of United States v. Dana*, 6 Peters R. 51 ; *Bank of Metropolis v. Jones*, 8 Peters R. 16 ; *Percy v. Millauden et al.* 3 Louisiana R. 568 ; *Bank of Pennsylvania v. Reed*, 1 Watts & Serg. (Penn.) R. 101.

³ *Taylor v. Miami Exporting Company*, 6 Ohio R. 218.

⁴ *Hartridge et al. v. Rockwell et al.* R. M. Charlton (Geo.) R. 260.

⁵ *Methodist Episcopal Church of Cincinnati v. Wood*, 5 Ohio R. 286.

⁶ *Davies*, R. 121, *Case of the Dean and Chapter of Fernes*.

yet held, that when once appointed, he might do everything incident to the nature of his service, not only without commandment by deed, but without any commandment whatever.¹ It was however early established, that a corporation might appoint officers of little importance and ordinary service, as a cook, a butler, a bailiff to take a distress, or that a commonalty might make an assignment of auditors, without deed.² In the case of *Horn v. Ivy*,³ it is laid down, that the appointment of a bailiff to make distresses for a corporation must be under seal; and Mr. C. J. Best seems to have considered that the case of *Manly v. Long*⁴ did not establish a different rule, but was to be distinguished as a case of necessity, owing to the hurry of the proceeding.⁵ In matters of consequence, or in the employment of one to perform on their behalf any but ordinary services, it was still held that corporations aggregate could not be bound without deed.⁶ Thus, in trespass for taking away a ship, the defendant justified as a servant to the *Canary Company*, by whose charter it was declared, "that none but such and such persons should trade to the Canaries, on pain of forfeiting their ships, goods, &c." It was objected that he ought to have shown his deed, whereby he was authorized to seize on behalf of the company, ships, goods, &c.; and Twisden, Justice, says, "I think they cannot seize without deed, any more than they can enter for condition broken without deed."⁷ Though by no means free from doubt, it seems in early times to have been the better opinion, that a corporation aggregate could not appoint a person to do any act in which its *real* property was

¹ 4 H. 7, 6, 13, 17; 7 H. 7, 9; 13 H. 8, 12.

² See same authorities and *Plowd.* 91 b.; 12 Ed. 4, 10, a.; H. 7, 25, 26; *Bro. Corp.* 51; 26 H. 8, 8, b.; *Bro.* 182, b.; *Anon.* 1 *Salk.* 191; *Manly v. Long*, 3 *Lev.* 107, 2 *Saund.* 305; and see *Smith v. Birmingham and Staffordshire Gas Light Company*, 3 *Nev. & Mann.* 771, *S. P.* 1 *Adolph. & Ellis*, 526.

³ 1 *Ventr.* 47.

⁴ 3 *Lev.* 107.

⁵ *East London Water Works v. Baily*, 4 *Bing. R.* 283.

⁶ *Horne and Ivy's Case*, 1 *Vent.* 47; *S. C.* 1 *Mod.* 18; *S. C.* 2 *Keble*, 567.

⁷ *Ibid.*

concerned, or by which its rights thereto were to be asserted, without deed, as an attorney to make or take livery of seizin,¹ an agent or servant to enter into land on its behalf for condition broken,² or to revest it with an estate of which it had been dis-seized.³ In the time of Elizabeth, it was, however, agreed by all the judges of the King's Bench, that if a sheriff make a warrant of arrest to a corporation which has return of writs, they may make a bailiff to execute it without writing.⁴ In the first year of Queen Anne a distinction seems to have been taken by the Court of King's Bench, between acts by a corporation upon record, and *in pais*; the former of which they might, and the latter they could not do, without their common seal. In the Mayor of Thetford's case,⁵ where a mandamus was returned without the common seal, and without the hand of the mayor, it was held a good return; and Lord Holt, Chief Justice, to whom the Court agreed, said, that a corporation may do an act of record without their common seal, because they are estopped by the record to say, that it is not their act; but not an act *in pais*; and he instanced the case of the City of London, who make an attorney yearly in the Court of King's Bench without signing or sealing. In commissions of bankruptcy, corporations usually appoint their clerk or treasurer to prove debts due to them; but, it is said, that he must produce his appointment under seal to the commissioners.⁶ It is also laid down by Mr. Kyd as a general rule, that the person, who appears on behalf of a corporation in a court of justice, must be authorized by warrant under the common seal;⁷ and such appears, though not without question, to have been the ancient doctrine.⁸ Notwith-

¹ 12 H. 7, 25, 26; Bro. Corp. 51; See *Bailiffs, &c. Ipswich v. Martin*, Cro. Jac. 411.

² 10 Ed. 4; 7 Ed. 4, 14; Bro. Corp. 54; 18 Ed. 4, 8; Bro. Corp. 59; 16 H. 7, 2; Bro. Corp. 96; 1 Rolle, 514; Dyer, 102, pl. 83; but see 12 Ed. 4 per Littleton; Bro. Corp. 56, Dyer, sup.

³ Jenk. 131.

⁴ Moore, 512.

⁵ 1 Salk. 191; 3 Salk. 103.

⁶ Cooke's Bankrupt Laws, (2d ed.) 175.

⁷ 1 Kyd on Corp. 265.

⁸ Plowd. 91; 2 Show. 366; but see 1 Skin. 154.

standing this general rule, however, it seems early to have been held in accordance with the intimation of Lord Chief Justice Holt above quoted, that a corporation might make an attorney in a court of record, without other writing than the record itself;¹ and the city of London may, and do, make an attorney in the King's Bench,² and present their mayor in the Exchequer every year, without either sealing or signing.³ In *Rex v. Bigg*,⁴ which was an indictment for rasing out an indorsement of part payment on a bank of England note, it seems to have been established, that a person, employed by the Governor and Company of the Bank of England to sign notes on their behalf, was competently authorized for that purpose, though entrusted and employed by mere vote, or other corporate act, not under the common seal; and in *Yarborough v. the Bank of England*,⁵ it was considered that a corporation might be bound by the acts of its servants, though not authorized under seal, if done within the scope of their employment. The present doctrine upon this subject, in England, seems to be, that an agent of a corporation need not be appointed under the corporate seal for acts of an ordinary nature, and which do not affect the interests of the corporation; but for acts which do affect the interest of the corporation they must be authorized by the corporate seal. Thus, they must appoint a bailiff by deed for entering lands for condition broken, in order to revest the estate; but they need not do so where the bailiff is only to distrain for rent.⁶

In this country, where private corporations for every purpose are so multiplied, that their facility of action has become a matter

¹ 13 H. 8, 12; Bro. Corp. 83.

² Mayor of Thetford's Case, 1 Salk. 192; 3 Salk. 103; Comb. 41, 422.

³ 1 Kyd on Corp. 267, cites Madox, Firma, Burgi, c. 7, *passim*.

⁴ 3 P. Wms. 419; 1 Stra. 18.

⁵ 16 East, 6.

⁶ *Smith v. Birmingham & Staffordshire Gas Light Company*, 3 Nev. & Mann, 771; S. C. 1 Adolph. & Ellis, 526; and see *East London Water Works Co. v. Bailey*, 4 Bing. R. 283; *Edwards v. Grand Junction Canal Co.* 1 M. & Craig, 659, 672; *Murray v. East India Co.* 5 Barn. & Ald. 204, 209, 210; *Story on Agency*, 54, n. 3.

of public importance, in the language of Kent,¹ "the old technical rule has been condemned as impolitic, and essentially discarded." A corporation may express its assent by its seal, by vote, or through its agents ; and in the case of *Bank of Columbia v. Patterson's Admr.*² the Supreme Court of the United States, after a full review of all the authorities, considered it as established law, that such a body might, by *mere vote*, or other corporate act not under the corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. In the subsequent case of *Fleckner v. U. S. Bank*,³ where the ancient doctrine, that a corporation can act only through the instrumentality of its seal, was objected to the validity of an indorsement made by the cashier of a bank, who was authorized merely by a resolution passed by the board of President and Directors, Mr. Justice Story, in delivering the opinion of the court, observes ; "Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal." It was farther decided in this case, that there was nothing in the civil code of Louisiana, which, in the slightest degree, points to the necessity of using a corporate seal in appointing agents of corporations, or authorizing corporate acts ; and that the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official acts done by the officers of the corporation ; and gives such acts a binding authority if evi-

¹ 2 Kent, Comm. 233.

² 7 Cranch. 305 ; and see *Bank of United States v. Norwood*, 1 Har. and Johns. (Md.) R. 426, per Chase, J.

³ 8 Wheat. R. 357.

denced by a vote.¹ In *Osborn v. U. S. Bank*,² upon its being objected that no authority was shown in the record from the Bank, authorizing the institution or prosecution of the suit, although it was admitted by the Supreme Court of the United States, that a corporation can only appear by attorney, and that the attorney must receive the authority of the corporation to enable him to represent it, yet it was held, that this authority need not be under seal. It was also decided upon principle and invariable practice, that the power of the attorney need not appear on the record; the court perceiving in this particular no distinction between a corporation and a natural person.³

Indeed it is the well settled doctrine in America that, as from their very structure corporations aggregate are made capable of acting, and are supposed to act by vote, it can make no difference whether their agents are appointed under the corporate seal, or by resolution, or vote; that the appointment may be legally made in either mode, and that too although the agent be appointed to convey the real estate of the corporation, or whatever may be the purpose of the agency.⁴ The ordinary and proper proof of the appointment and authority of an agent of a corporation is made by the production of the records or books of the corporation, con-

¹ Ibid. 360. See Civil Code of Louisiana.

² 9 Wheat. R. 738; and see *McMecken v. The Mayor &c. of Baltimore*, 2 Har. & Johns. (Md.) R. 41; *Gaines v. Tombeckbe Bank, Minor*, (Ala.) R. 50; *Bank of Montgomery v. Harrison*, 2 Porter, (Ala.) R. 540; *Carry v. Bank of Mobile*, 8 Porter, (Ala.) R. 374; (*Legwood et al. v. Planters &c. Bank, Minor*, (Ala.) R. 23 overruled; *Vance v. Bank of Indiana*, 1 Black. (Ind.) R. 80.

³ *Osborn v. Bank of United States*, 9 Wheat. R. 738, per Marshall Ch. J.

⁴ *Randall v. Van Vechten*, 19 Johns. (N. Y.) R. 65; *The Baptist Church v. Mulford*, 3 Halst. (N. J.) R. 182, 184; *Perkins v. The Washington Insurance Company*, 4 Cowen, (N. Y.) R. 645; *Lathrop v. Bank of Scioto*, 8 Dana, (Ky.) R. 115; *Savings Bank v. Davis*, 8 Conn. R. 191; *Buncombe Turnpike Company v. McCarron*, 1 Dev. & Bat. (N. C.) R. 306; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Andover &c. Turnpike Corporation v. Hay*, 7 Mass. R. 602; *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. 297; *Essex Turnpike Corporation v. Collins*, 8 Mass. R. 292; *Wright v. Lanckton*, 19 Pick. (Mass.) R. 290; *Dana v. St. Andrews Church*, 14 Johns. (N. Y.) R. 118; *Union Bank of Maryland v. Ridgely*, 1 Har. & Gill. (Md.) R. 324; *Kennedy v. Baltimore Insurance Company*, 3 Har. & Johns. (Md.) R. 367; *Garrison v. Combs*, 7 J. J. Marsh, (Ky.) R. 85; *Legrand v. Hampden Sidney College*, 5 Munf. (Virg.) R. 324.

taining the entry or resolution of appointment, the records being proved to be the records of the corporation ;¹ and the secretary of the corporation is obviously the proper person to have possession of and to prove the books of the company.² But where in a suit against a corporation on a bill of exchange accepted by one, in behalf of the corporation, as its treasurer, notice was given by the plaintiff to the corporation to produce its records for the purpose of proving the appointment or election of the treasurer, and the production of the records was refused, the testimony of a witness was admitted that he had seen the records, and that it appeared therein that the person accepting the bill was duly elected treasurer, as competent proof of his appointment and authority.³

2. We have seen, that in order that the acceptance of an official bond should be made by a corporation so that the instrument would bind the sureties, that the recording of the vote of acceptance or approval is not essential to its validity, unless the charter, statute, or by-laws, expressly make it so ; even though an officer of the corporation be required to keep a fair and regular record of all its proceedings ; this provision usually being merely directory.⁴ Neither is it indispensable to show a written instrument or vote of acceptance of a charter,⁵ or a written enactment, or repeal of by-laws, on the corporation books ; all which may be inferred from the acts of the corporation, through its officers, or otherwise.⁶ Upon the same principle it seems clear, that a vote or resolution appointing an agent need not be entered on the minutes or records of the corporation, in order to his due appointment ; unless the

¹ *Buncombe Turnpike Company v. McCarron*, 1 Dev. & Bat. (N. C.) R. 306; *Owings v. Speed*, 5 Wheat. R. 424; *Thayer v. Middlesex Mutual Insurance Company*, 10 Pick. (Mass.) R. 326; *Narraganset Bank v. Atlantic Silk Company*, 3 Metcalf, (Mass.) R. 282; *Clark v. Benton Manufacturing Company*, 15 Wend. (N. Y.) R. 256.

² *Smith v. Natchez Steamboat Company*, 1 Howard, (Miss.) R. 478.

³ *Narraganset Bank v. Atlantic Silk Company*, 3 Metcalf, (Mass.) R. 282; and see *Thayer v. Middlesex Mutual Insurance Company*, 10 Pick. (Mass.) R. 326; *Clark v. Benton Manufacturing Company*, 15 Wend. (N. Y.) R. 256.

⁴ See Chap. VII.

⁵ See Chap. VII.

⁶ See Chap. X.

charter, statute, or by-laws, are not merely directory in this particular, but render it absolutely essential. The vote of appointment might, therefore, as an appointment of an agent by a natural person, be implied from the permission or acceptance of his services, from the recognition or confirmation of his acts, or in general, from his being held out as an authorized agent of the corporation. "A board," says Mr. Justice Story,¹ "may accept a contract, or approve a security by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence, than if it were reduced to writing. But, surely, this is not a sufficient reason for declaring, that the vote or assent is inoperative." The same reason applies as fully to the appointment of an agent by a corporation, or a board acting for it. And again, the same learned judge, speaking of a cashier of an office of discount and deposit created by the Bank of the U. S. says, "If he was held out as an authorized cashier, that character was equally applicable to all who dealt with the bank, in transactions *beneficial* as well as onerous to the bank." In the case of *Dunn v. St. Andrew's Church*,² it appeared that the plaintiff had performed services as clerk of the church, for which he had received some payment. The records of the corporation contained entries of the payment of money at several times, to the plaintiff, for his services; but no resolution was entered on the minutes or records of the corporation, appointing the plaintiff clerk of the church. The Court held such vote unnecessary to be shown; and that there was sufficient evidence of an implied promise of the corporation to make the compensation. We need hardly add, that if in such case the agent is held duly appointed, as between the corporation and himself, a fortiori he would be, as between the corporation and third persons; though precisely the same principle seems to apply even *in favor*, as against the corporation.³ Indeed, it seems that the same presumptions are applicable to corporations, as to natural persons. Persons acting publicly, as officers of a corporation, are presumed to be rightfully in office;

¹ Bank of the U. S. v. Dandridge, 12 Wheat. 83, and authorities above.

² 14 Johns. (N. Y.) R. 118.

³ Bank of the U. S. v. Dandridge, 12 Wheat. R. 89, per Story. J.

acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. If a person acts notoriously as cashier of a bank, and is recognised by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or *can be* adduced of his appointment;¹ for the law will not sanction the fraud of a corporation, sooner than that of an individual." A proprietors committee having in their behalf entered into a submission of demands to referees under the statute, representing themselves as duly authorized so to do, and the proprietors having been heard upon the merits before the referees making no objection to the submission, upon error brought to reverse a judgment rendered on the award, the Court presumed that the committee had due authority, though the want of authority was assigned for error.²

3. It is usually the case, that the charters or incorporating acts of corporations require that officers of great trust, as the cashiers of banks, or the clerks of insurance companies, should give bond with sureties for the faithful performance of their duties; and the question immediately arises, whether the giving of the bond with sureties, in such cases, is necessary to their complete appointment as corporate officers and agents. This must depend, in each particular case, upon whether the language of the charter or act

¹ Ibid. 12 Wheat. R. 70, per Story, J.; *Union Bank of Maryland v. Ridgely*, 1 Harris & Gill. (Md.) R. 392; *Barrington and others v. The Bank of Washington*, 14 Serg. & Rawle, (Penn.) R. 421, per Duncan, J.; *Wild v. Bank of Passamaquoddy*, 3 Mason, C. C. R. 505; *Smith et al. v. Governor and Co. of Bank of Scotland*, 1 Dow, Parl. R. 27; *Perkins v. Washington Insurance Company*, 4 Cowen, (N. Y.) R. 645; *Troy Turnpike & Rail Road Company v. McChesney*, 21 Wend. (N. Y.) R. 296; *Warren v. Ocean Insurance Company*, 16 Maine R. 439; *Davidson v. Borough of Bridgeport*, 8 Conn. R. 472. Mere general reputation is, however, inadmissible to prove who are the officers or agents of a corporation. *Litchfield Iron Company v. Bennett*, 7 Cowen, (N. Y.) R. 234. It must be coupled with acts of charge and management of the property and concerns of the corporation. *Clark v. Benton Manufacturing Company*, 15 Wend. (N. Y.) R. 256.

² *Fryeburg v. Frye*, 5 Greenl. (Me.) R. 38.

of incorporation makes the giving of the bond a condition precedent to the complete appointment and due authorization of the agent, or whether it is in this respect merely directory. And it seems, that where the act of incorporation, charter, or general statute binding upon a corporation, empowers a board of directors, vested with power to appoint certain officers, to require security of them, that this is merely in affirmance of the common law ; and though a by-law requires a certain species of security to be taken by the directors of certain officers on entering on the duties of their office, if a different species of security than that required by the by-law is taken by the directors, and any loss is sustained in consequence, this is a matter entirely between the directors and stockholders, for the failure of duty in the former ; and in such a case there seems to have been no question of the due appointment of the officer.¹ And in the case of the *Bank of the United States v. Dandridge*,² where it appeared that the directors of the parent bank, empowered to establish offices of discount and deposit subject to such rules and regulations as they should deem proper, passed a by-law directing "that the cashier of each office shall give bond to the President, Directors, and Company of the Bank of the U. S. with two or more *approved* securities, with condition for his good behavior and faithful performance of his duties to the corporation ;" and a fundamental article of the constitution of the bank directed, "that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond &c. " ; it was held, that a cashier appointed and permitted to act in his office, without giving any such bond, or any bond whatever, was a legal agent of the corporation notwithstanding ; that his acts and contracts within the scope of his authority were valid, whether in favor of the bank, or against it in favor of third persons ; that the charter and by-laws were directory in this particular, and the

¹ *The Bank of Northern Liberties v. Cresson*, 12 Serg. & Rawle, (Penn.) R. 306,

² 12 Wheat. R. 64 ; Marshall, C. J. dissentiente. And see analogous cases. *United States v. Kirkpatrick*, 9 Wheat. R. 720 ; *United States v. Van Zandt*, 11 Wheat. R. 184 ; *Peppin v. Cooper*, 2 Barn. & Ald. 436, 437.

taking of the bond not made by them a condition precedent ; and that though the directors might be responsible for their neglect of duty, it was a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws. It is admitted, however, that if the statute had prescribed that the cashier should not be deemed for any purpose in his office, until an approval of his official bond by the proper board, his acts would be utterly void, unless his bond had been given and approved.¹

And where an act "to establish a State Bank," prescribed that the cashier should take an oath to perform the duties of his appointment, the fact, that he did not take the oath was held not to prevent a recovery upon his official bond, which admitted that he was cashier, but rather to be a breach of the bond, which stipulated that he should perform all his duties as cashier.² So too, where by a by-law a corporation required for their own security their clerk to be sworn, it was adjudged that they could not avail themselves of his omission to take the oath, in defence to an action against them by one, claiming to be a stockholder under a deed recorded by the clerk in his capacity of recording officer of the corporation.³

§ 4. Though the charter or act of incorporation prescribes the mode in which the officers of a corporation aggregate shall be elected ; and an election contrary to it would unquestionably be voidable ; yet if the officer has come in under *color* of right, and not in open contempt of all right whatever, he is an officer *de facto*, — within his sphere, an agent of the corporation, — and his acts and contracts will be binding upon it.⁴ Where an action has

¹ Bank of United States v. Dandridge, 12 Wheat. R. 878, per Story, J.

² State Bank at Elizabeth v. Chetwood, 3 Halst. (N. J.) R. 1; and see Hastings v. Bluehill Turnpike Company, 9 Pick. (Mass.) R. 80; Panton Turnpike Company v. Bishop, 11 Vermont R. 198.

³ Hastings v. Bluehill Turnpike Corporation, 9 Pick. (Mass.) R. 80.

⁴ The King v. Leslie, And. R. 163; S. C. 2 Stra. 190; Vestry of St. Luke's Church v. Matthews, 4 Dessau. (S. C.) R. 578, 586; Vernon Society v. Hills, 6 Cowen, (N. Y.) R. 23; All Saints Church v. Lovett, 1 Hall, (N. Y.) R. 191.

been commenced by the officers *de facto* of a corporation, no other persons claiming a right to act as the officers of the corporation, the defendant cannot be permitted to show, for the purpose of defeating the action, that the officers were illegally elected.¹ On the other hand, the service of process upon the secretary *de facto* of a manufacturing corporation, for the purpose of attaching the stock of the company was held good under a statute regulating such process.² Where an abbot or parson erroneously *inducted* made a deed or obligation, though he was afterwards deprived of his benefice, yet this shall bind ; but the deed of one who usurps *before* installation or induction, or who enters and occupies in time of vacation, *without* election or presentation, is void. So, if one occupies as abbot *of his own head*, without installation or induction, his deed shall not bind the house.³ In a case where it appeared, that the Queen's auditor and surveyor of a county had appointed a steward of a manor without any right so to do ; it was moved by the counsel and conceded by the court, that a copy granted by the steward *de facto* in court, he having admitted the tenant, and the fine being answered to the Queen, was good ; "for," say they, "the law favors the acts of one in a reputed authority ; and the inferior shall never inquire if his authority be lawful ;" and 2 Edw. 6. Br. "Copy, 26, it was held, that grant by copy by one in court, who hath no authority to hold court, is good." The case, it is true, went off on the special ground, that the grant in question was void, not being a thing of necessity, but a *new* grant in prejudice to the Queen, as a lady of the manor by escheat for felony.⁴

A person, *by color of election*, may be an officer *de facto*, though indisputably *ineligible* ;⁵ or though the office was *not vacant*, but there was an existing officer *de jure* at the time.⁶

¹ Charitable Association v. Baldwin, 1 Metcalf, (Mass.) R. 359 ; and see Green v. Cady, 9 Wend. (N. Y.) R. 414.

² McCall v. Byram Manufacturing Company, 6 Conn. R. 428.

³ Vin. Abr. officer and offices, G. 4, pl. 1.

⁴ Harris v. Jays, 2 Cro. E. 699.

⁵ Knight v. The Corporation of Wells, Lutw. 508.

⁶ O'Brien v. Knivan, Cro. Jac. 552 ; Harris v. Jays, Cro. E. 699.

Indeed, it seems to be clear law, that the act of an officer *de facto* is good, wherever it concerns a third person, *who had a previous right to the act, or had paid a valuable consideration for it*; and this, whether the act concerns the preservation of the corporation or not.¹ In a case in Pennsylvania, it appearing that a bank was governed by thirteen directors, five of whom were competent to the business of ordinary discounts, but nothing less than a majority of the whole number constituted a quorum for transacting any other business; and a *director was elected* at a meeting at which *five* only of the board were present; it was held, that, having color of election, he was a director *de facto*; and that as an agent of the corporation, his acts were valid, at least as between the bank and third persons.² The best definition we have seen of an officer *de facto* is that given by Lord Ellenborough in the *King v. The Corporation of Bedford Level*.³ “*An officer de facto*,” says he, “*is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.*” He instances the case of an under-steward when the head-steward, his principal, is dead; who having color to assemble the tenants, if they do their service, the acts, which he does in consideration of it, are good.⁴ This, says Lord Ellenborough, must be understood of acts of the under-steward after the death of his principal, *and before his death is known*; for if that were known to the tenants, what color could he have to act? It is said that the acts of a steward *de facto* are good, because the suitors cannot examine his title; but when his authority has notoriously ceased, no such reason obtains.”⁵ The cases, usually found in the books concerning officers *de facto*, are cases in which the form of election, though imperfectly, seems to have been observed; or those in which the officer came rightfully into office, though

¹ *The King v. Leslie*, And. R. 163; *Riddle v. County of Bedford*, 7 Serg. & Rawle, (Penn.) R. 392; *Lathrop v. Bank of Scioto*, 8 Dana, (Ky.) R. 115.

² *Baird v. The Bank of Washington*, 11 Serg. & Rawle, (Penn.) R. 411; see *Ex parte Rogers*, 7 Cow. (N. Y.) R. 530, n.

³ 6 East, R. 368, 369; and see *Parker v. Kett*, 1 Ld. Raymd., 658.

⁴ *Knowles v. Luce*, Moor, 112.

⁵ *King v. The Corporation of Bedford Level*, 6 East, 369.

he improperly *continues* to exercise its functions, as in the instance of the under-steward above quoted. A person in office without even the form of election might, within the terms of Lord Ellenborough's definition, have the reputation of being the officer he assumes to be ; and in such case, unless the act of incorporation, or general statute law, expressly avoids them, if the corporation held him out to the world as its officer, his acts would be binding on it as the acts of its agent, whether he was technically an officer *de facto*, or not.¹

§ 5. Where the term, for which a particular officer, or agent of a corporation, shall hold his office or agency by virtue of an election or appointment, is prescribed by charter, act of incorporation, or general law, as a general rule, his power of course ceases with the expiration of the term ;² though unquestionably, the corporation may be liable for his acts and contracts in favor of third persons, if they still continue to hold him out as their servant.³ With the agent of a corporation, as with an agent of a natural person, if he is appointed for a special purpose, his power determines when that purpose is answered.⁴ Where, on the other hand, the act of incorporation does not limit the term of his agency, this must depend upon the term of his appointment ; and where no term is prescribed at the time of his creation, whether his agency continues until his powers are specially revoked or not, must depend as in ordinary cases, upon its nature. If the agency be general, and unlimited as to term, it lasts, of course, until the powers given are revoked. As the death of a natural person revokes all authority given to his agents, so must, so to speak, the

¹ Bank of U. S. v. Dandridge, 12 Wheat. R. 70 ; Union Bank of Maryland v. Ridgeley, 1 Harris & Gill, (Md.) R. 421, 422, &c. ; Wild v. Bank of Passamaquoddy, 3 Mason, C. C. R. 505 ; Barrington and others v. The Bank of Washington, 14 Serg. & Rawle, (Penn.) R. 405 ; Minor v. Mech. Bank of Alexandria, 1 Pet. 46.

² Curling v. Chalklen, 3 Maule & Sel. 510, 511 ; Peppin v. Cooper, 2 Barn. & Ald. 431.

³ § 3, part 2, of this Chapter.

⁴ Seton v. Slade, 7 Ves. Jr. 276.

death of a corporation ; whether it takes place by limitation of law, or forfeiture of chartered rights ; for there is then no master to serve.¹ The death, however, of the particular officers of a corporation, or of the members of a particular board who may be vested with the power of appointing its agents, does not determine their agency, or revoke their power ; for the principal, the corporation still subsists.² Accordingly, if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seizin, this authority does not determine by the death of the mayor or dean ; but the attorney may well execute the power after their death ; because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and, therefore, may be represented by an attorney of their appointment ; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good.³ The rule is different with regard to the *deputy* of an officer or agent ; for though in *Knowles v. Luce*,⁴ it seems to have been held generally, that the acts of an under-steward were good, though the head-steward be dead, the court of King's Bench, in *King v. The Corporation of Bedford Level*,⁵ declare, that this must be understood of the acts of the under-steward after the death of his principal, *and before his death is known*, on the ground of his color of right. In this last case, where it appeared that a corporation had, at the request of their registrar, appointed a deputy registrar to assist him, it was considered that the authority of the latter was determined by the death of the former, upon the general principle.⁶

¹ *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, (Md.) R. 433, 434.

² *Bac. Abr. Authority*, E. 14 H. 8, 3; 11 H. 7, 19; *Co. Lit.* 52; 2 *Roll. Abr.* 12.

³ 2 *Roll. Abr.* 12.

⁴ *Moor*, 112; *Parker v. Kett*, 1 Ld. Raymd. 661; and see 1 *Watkins on Copyh.* 257.

⁵ 6 *East*, 369.

⁶ *Ibid.*

Though the power of appointing a particular officer or agent of a corporation be vested in a body, as the Directors, Managers, &c., existing within it, it does not follow that the authority of the agent is determined by the removal of the board which appointed him; or that because they are appointed but for a year, his agency expires with that period.¹ Thus, where a letter of attorney was given by the directors of a bank, it was held, that the attorney might execute his power under it, after the term for which the directors were appointed had expired; since the constituent, to wit, the corporation, still continued in existence.²

And where the charter of a bank empowered the directors for the time being, to appoint a cashier and such other officers and servants under them, as should be necessary for executing the business of the corporation, it was decided by the Supreme Court of Maryland, that the office and power of the cashier did not cease with the office and power of the directors who appointed him, nor was of annual duration only because theirs was; but, that the duration of the cashier's office was limited only by the duration of the charter of the bank, subject always to be terminated by the directors, as occasion might require.³ The mere fact, however, that an agent is *in some respects* the deputy of annual officers, by no means proves, that he is an annual officer himself; for, it may be, that his appointment was made to remedy the inconvenience of annual officers, the deficiency of service which may result from the casual interruption of an annual election.⁴

§ 6. 1. Where the charter or act of incorporation prescribes the mode in which the officers or agents of a corporation must

¹ *Anderson v. Longden*, 1 Wheat. R. 85; *John Brown v. The Inhabitants of the county of Somerset*, 11 Mass. R. 221; *Northampton Bank v. Pepoon*, 11 Mass. R. 268; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 335.

² *Northampton Bank v. Pepoon*, 11 Mass. R. 294.

³ *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, (Md.) R. 431, 432, 433; *Exeter Bank v. Rogers, et al.*, 7 New Hamp. R. 33; *Thompson v. Young et al.*, 2 Hammond, (Ohio) R. 334; 1 Ohio Cond. R. 383; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 34.

⁴ *Curling v. Chalklen*, 3 Maule and Sel. 509 to 511.

act or contract, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued. For the act of incorporation is an *enabling* act ; it gives the body corporate all the power it possesses ; it enables it to contract, and when it prescribes the mode of contracting, that mode must be observed, or the instrument no more creates a contract, than if the body had never been incorporated. Besides, when its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable them to bind the company, the informality of the transaction is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties.¹ In illustration of this, where an act incorporating an insurance company, enacted, "that all policies of assurance and *other instruments*, made and *signed* by the president of the said company, or any other officer thereof, according to the ordinances, by-laws, and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof ;" it was held, that a contract to cancel a policy, is as solemn an act as a contract to make one ; and to become the act of the company, must be executed according to the forms in which by law they are enabled to do it ; and hence, that an *unsigned* note, containing an assent to a cancellation from the directors of the company, was not a corporate act obligatory upon it.² Where, however, the charter of an insurance company required that all *policies* should be signed by the president, it was considered unnecessary that the assent of the company to an *assignment* of the policy should be signed by the president, in order to bind the company.³ The signature of the secretary to such an assignment is *prima facie* evidence of an agreement by the company ; and the

¹ Per Marshall, C. J. ; *Head and Amory v. The Providence Ins. Co.* 2 Cranch, R. 166 to 169.

² *Head v. Providence Insurance Co.* 2 Cranch, R. 166 to 169 ; *Ducarry v. Gill*, 4 Car. & P. 121.

³ *New England Marine insurance Co. v. D'Wolf*, 8 Pick. (Mass.) R. 56.

Company, by accepting the assignee's guaranty of the premium note, adopts the act of the secretary, in assenting to the assignment.¹ When by charter a board are constituted the agents of a corporation for particular purposes, and the number necessary to be present at the doing of an act is therein specified, as we have seen, an act done or a contract made by less than, or others than those specified, will not bind the company.² If the charter specifies no particular number of the board of directors as requisite to bind the corporation, that power resides in a majority ;³ and it is very clear that a contract made by a minority of a committee appointed for the purpose of making it, not assented to by a majority, nor by the corporation, does not bind the latter.⁴ A majority of a committee authorized to sell lands by legislative resolve, or to do business of a public nature, have power to execute the commission ;⁵ but in case of quasi corporations, where a certain number, as three persons, are appointed or authorized to do a particular act, as to choose a chaplain, or to contract for the building of a meeting house, in general they must concur in the act or contract to render it binding ; though perhaps direct proof that all assented would not be required. This, in England it has been held, may be varied by ancient usage.⁶ A bank charter provided, "that all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, should be signed by the President, and countersigned by the Cashier ; and that the funds of the corporation should in no case be liable for any contract or engagement, unless the same be signed and countersigned as

¹ Ibid.

² *Beatty v. the Marine Ins. Co.* 2 Johns. (N. Y.) R. 109; and see *Kupfer et al. v. South Parish* in *Augusta*, 12 Mass. R. 185; *Ex parte Rogers*, 7 Cowen, (N. Y.) R. 529, 530.

³ *Cram v. Bangor House*, 3 Fairf. (Me.) R. 354.

⁴ *Trott v. Warren*, 2 Fairf. (Me.) R. 227; *Adams v. Hill*, 16 Maine R. 215.

⁵ *Pejepscot Proprietors v. Cushman*, 2 Greenl. (Me.) R. 94; and see *Grindley v. Barker*, 1 Bos. & Pul. 229; *Curtis v. Kent Water Works Co.* 7 Barn. & Cres. 332.

⁶ *Attorney General v. Davy*, cited, 1 Ves. Sr. R. 419. *Kupfer et al. v. South Parish* in *Augusta*, 12 Mass. R. 189.

aforsaid ;" the clause was held to apply only to *express* contracts, and not to extend to contracts and undertakings implied in law ; and accordingly the bank was made liable under money counts on a check signed only by the cashier.¹ In such case, however, a court will never assume that an act was done or a contract made, by less than the number legally authorized ; but the fact must be strictly proved. And where the act of incorporation required the number of *five* managers to constitute a quorum, with power to *enter* into contracts, a contract to which the seal of the corporation was affixed, was held valid, though *signed* by only *three* managers ; there being no proof, that the seal, which was itself held *prima facie* evidence of the legal execution of the contract, was not affixed by the direction of a legal quorum.² A clause in an act of parliament, authorizing a company at any general or special meeting, to order and dispose of their common seal and the use and application thereof, empowers them to make rules and regulations, for its custody, but does not require their concurrence in each particular act of sealing ; and a bond, to which the seal had been affixed by the company's clerk, under a general authority from the directors, was held valid.³ And where a board of bank directors authorized the President and Cashier to " borrow money ;" though it was considered necessary that both should *assent* to the plan of borrowing, yet it was held unnecessary that both should sign the draft, or endorse the note upon which money was raised, to bind the bank by the drawing or endorsement.⁴

2. The agents of private persons are not in the habit of keeping regular minutes of all their joint proceedings ; neither does the law require such a verification of their joint acts. It seems

¹ *Mechanics Bank of Alexandria v. The Bank of Columbia*, 5 Wheat. R. 326.

² *The President, Managers, and Co. of the Berks. and Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawle, (Penn.) R. 12.

³ *Hill v. Manchester & Salford Water Works Co.*, 5 B. & Adolph, 806; 2 Nev. & M. 573.

⁴ *Ridgway v. Farmer's Bank of Bucks County*, 12 Serg. & Rawle, (Penn.) R. 260; *Fleckner v. Bank of U. S.* 8 Wheat. R. 338.

never to have been contended, either that the acts of a *board* of agents, constituted by an unincorporated company, or by a single person, must, of necessity, be reduced to writing, before they would bind the principal ; and it is a matter of daily experience, that the acts of a *single* duly authorized agent of a corporation, within the scope of his authority, bind the corporation, although he keeps no minutes of such acts. It being usual, however, with the *boards* of directors or *agents*, created within incorporated companies for the due management of their concerns, to keep a regular record of their proceedings, the charter or by-laws commonly directing it to be done ; it has been by no means an uncommon opinion, that such a record was essential either to the validity or proof of their acts and contracts, whether in favor or against the corporation. As a general rule, however, this opinion is by no means true. If indeed the charter, or creating and enabling act of a corporation, expressly make the recording of the acts of its board of directors essential to their validity, or a condition precedent thereto ; or if it make a record taken by a prescribed officer, the only mode by which such acts could be legally proven ; it is very obvious, that to render the acts of the board obligatory whether for or against the corporation, the charter requisite must be complied with in the one case, and that the charter mode of proof is the only one that could be resorted to, in the other. The books, however, furnish us with no such provision, in the charter of any corporation ; and without it, there seems to be nothing, in principle or authority, to distinguish in this particular the acts of a board of agents existing within a corporation, from the acts of agents constituted by natural persons. It is usual indeed, by way of notice, and to facilitate proof, for the charter and by-laws to provide, that a fair and regular record of the proceedings of the managing board of a corporation should be made by some designated officer, as the cashier of a bank, or the clerk or secretary of an insurance company. Such provisions are in common merely *directory* to the corporation, its officers, or agents ; and the breach or neglect of them, though it may render the directors or their scribe responsible in case of consequential damage for violation of duty, is a matter wholly between them-

selves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws, and by no means affects the validity of the unrecorded acts.¹ As a rule of evidence indeed, where the record exists, it should be produced, as being the best proof; but if there be no record, or, if the suit be against the corporation, and upon notice, the corporation neglects or refuses to produce its books, other evidence is admitted.²

§ 7. Unless the act of incorporation expressly prescribe the contrary, as has been before considered, the duly authorized agents of corporations, as of natural persons, may, within the scope of their authority, bind them by simple as well as by sealed contracts; and that too, in both cases, whether authorized by deed or vote; and from their acts or conduct, as well as from the acts or conduct of the agents of natural persons, implications may be made, either for or against their constituents.³

§ 8. 1. When the agent of a corporation would bind by a contract, he makes in its behalf, the corporation only, his *proper* mode is, in the body of the contract, to name the corporation, as the contracting party, and to sign as its agent or officer; and this is the mode in which bank bills and policies of insurance are ordinarily executed. The secretary of a bridge company signed his name to a lottery ticket as the secretary of the corporation, expressly contracting on its behalf, and it was held, that he was not personally responsible.⁴ And on a note in which the President and Directors of a glass company promise to pay, and

¹ Bank of the U. S. v. Dandridge, 12 Wheat. R. 75 to 89, per Story, J., Marshall, C. J. dissentiente; Bank of the Northern Liberties v. Cresson, 12 Serg. & Rawle, (Penn.) R. 306; Scott v. Warren, 2 Fairf. (Me.) R. 227; Cram v. Bangor House, 3 Fairf. (Me.) R. 354; Russell v. McLellan, 14 Pick. (Mass.) R. 63; Middlesex Husbandman, &c. v. Davis, 3 Metcalf, (Mass.) R. 133; Davidson v. Borough of Bridgport, 8 Conn. R. 472; see too United States v. Kirkpatrick, 9 Wheat. R. 720; Same v. Van Zandt, 11 Wheat. R. 184; 1 Phillips, Evid. ch. 5 § 2, 326; Bassett v. Marshall, 9 Mass. R. 312.

² See in this chap. *supra* § 3, parts 1 & 2.

³ Chap. VIII. § 7, 8.

⁴ Passmore v. Mott, 2 Binney, R. 201.

which was signed by one as President, it was held, that he was not liable.¹ And though the words of the note were, "I promise," yet it being signed by the agent for the company, it was held to be the note of the company and not of the agent.² Where, too, a note was made payable to one without naming his capacity, who endorsed his name thereon as *agent*, he was considered not liable *in favor of one who knew that the endorser acted as agent*, and that the note was given by the company for their proper debt, though it was said he might be in favor of a third person; such an endorsement being regarded as made for the purpose of transferring the interest in the note merely, and equivalent to a declaration, that the endorser would not be personally responsible.³ Again, where the rector and wardens of a church, pursuant to a vote of the proprietors, borrowed money for the use of the proprietors, and subscribed in their capacity a note for it, and the old act being repealed, a new corporation of the same name was created, which assumed the debts of the old one, it was decided that the new corporation was answerable on the note, or at least on the money counts.⁴ In another case, one describing himself in the body of a note as treasurer of a corporation, signed it as treasurer, the note being given for a debt due the payee by the corporation; and an action against him personally was not maintained.⁵ In *Sterling v. The Marietta and Susquehannah Trading Company*⁶ it was also decided, that a receipt signed by the president of a bank, without the addition of his capacity, for money "to be deposited in the bank to the credit of Ostebank," (the person to whom the receipt was given,) was

¹ *Mott v. Hicks*, 1 Cowen, (N. Y.) R. 513; see too, *Shotwell v. McKeown*, 2 South, (N. J.) R. 828; *Bowen v. Norris*, 2 Taunt. R. 374; *Shelton v. Darling*, 2 Conn. R. 435; *Brockway v. Allen*, 17 Wend. (N. Y.) R. 40.

² *Emerson v. Providence Hat Company*, 12 Mass. R. 237; *Long v. Coburn*, 11 Mass. R. 97.

³ *Ibid.*

⁴ *The Episcopal Charitable Society v. The Episcopal Church in Dedham*, 1 Pick. (Mass.) R. 372.

⁵ *Mann v. Chandler*, 9 Mass. R. 335.

⁶ 11 Serg. & Rawle, (Penn.) R. 177; see *State Bank v. Kain* 1 Bre. (Ill.) R. 45.

evidence, though not conclusive, from which the jury might presume that the money went to the use of the bank. And where on a sale of real property by a corporation a memorandum of the sale was signed by the parties, on which it was stated, that the sale was made to the purchaser, and that he and C. D. "mayor of the corporation, on behalf of himself, and of the rest of the burgesses and commonalty of the borough of Caermathen," do mutually agree to perform and fulfil on each of their parts, respectively, the conditions of sale, which was signed by the purchaser, and by "C. D. mayor," it was held, that the agreement was that of the corporation, and not of the mayor personally; and, that, consequently the mayor, as such, could sue thereon.¹

Indeed, it would seem that the acts and contracts of agents do not derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, that the act was done in the exercise, and within the limits of the powers delegated, and especially, that it was the intent of the parties that the principal, and not the agent, should be bound. In ascertaining these facts, as connected with the execution of a written instrument, it has been held, that parol testimony is admissible. Accordingly where a check was signed by the cashier of a bank, without the addition of the word "Cashier" to his name, dated at the bank and made payable to its teller, it appearing doubtful upon the face of the instrument, whether it was a private or an official act, parol evidence was admitted to show that it was an *official* act, though the check was credited on the books of the bank to the cashier's private account.² The question in these cases seems to be, as to whom the credit is given.³ Where, however, the President of an

¹ *Bowen v. Norris*, 2 Taunt. R. 374. See *Kennedy v. Gouveia*, 3 Dow & Ryl. 503; *Hopkins v. McLaffey*, 11 Serg. & Rawle, (Penn.) R. 129; *Mayor v. Barker*, 6 Binn. (Penn.) R. 228, 234.

² *Mechanics Bank v. Bank of Columbia*, 5 Wheat. R. 326; *Northampton Bank v. Pepoon*, 11 Mass. R. 282.

³ *Ib.*; *Mott v. Hicks*, 1 Cowen, (N. Y.) R. 536, per Woodworth, J.

Insurance Company, in transacting the business of the company, gave a note in which he described himself as President of the company, the note was considered the note of the President, and not of the company, the addition to his name being regarded as *descriptio personæ*.¹ It would be extremely difficult to reconcile this decision either with principle or authority.²

2. To bind a corporation by *specialty*, it is necessary that its corporate seal should be affixed to the instrument.³ But a lease to which the corporate seal was affixed, signed by certain persons, who were incorporated by the style of "the trustees of the parish of Newburgh," with their several names, was held not vitiated as a corporation act by the several signatures.⁴ The corporate seal is the only *organ* by which a body politic can oblige itself by *deed*; and though its agents affix their *private* seals to a contract binding upon it; yet these not being *seals* as regards the corporation, it is in such case bound only by simple contract.⁵

3. In the *Bank of Columbia v. Patterson's Admr.*,⁶ which was *indebitatus assumpsit* for work and labor done by the intestate of the defendant in error for the bank, by virtue of an agreement made with him by the duly authorized agents of the corporation under their private seals; the contract being made for the exclusive benefit of the corporation, which had on the faith of it paid money from time to time to the intestate, the Supreme Court of

¹ *Barker v. Mechanics Insurance Company*, 3 Wend. (N. Y.) R. 98.

² Authorities above and *Hills v. Banister*, 8 Cowen, (N. Y.) R. 31; *Brockway v. Allen*, 17 Wend. (N. Y.) R. 40; *Story on Agency*, p. 143, 144, § 154, and note 1.

³ See Chap. VII.

⁴ *Jackson v. Walsh*, 3 Johns. R. 225; and see *The President, Managers, and Co. of the Berks and Dauphin Turnpike Road v. Myers*, 6 Serg. & Rawle, (Penn.) R. 12; *Clark v. Benton Manufacturing Company*, 15 Wend. (N. Y.) R. 256; *McDonough v. Templeman*, 1 Har. & Johns. (Md.) R. 156.

⁵ *Randall v. Van Vechten*, 19 Johns. (N. Y.) R. 65, per Platt, J.; *Tippets v. Walker et al.* 4 Mass. R. 597, per Parsons, C. J.; *Bank of Columbia v. Patterson's Admr.* 7 Cranch, 304, per Story, J.; *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. (N. Y.) R. 285; and see Chap. VII.

⁶ 7 Cranch, 299.

the United States held the action well brought, though Mr. Justice Story, in delivering the opinion of the Court, intimates, that an action might have laid against the contracting committee personally, upon their express obligation. In *Randall v. Van Vechten and others*,¹ a case in its facts, similar to that just mentioned, the question, whether the contracting committee were under such circumstances personally liable on their sealed covenant, came directly before the Supreme Court of the State of New York; and it being proved, that the covenantee had recognised the contract as that of the corporation, the court held the committee not liable, upon the express ground that the corporation was suable in *assumpsit*. These cases are to be carefully distinguished from *Taft v. Brewster et al.*² and *Tippets v. Walker et al.*³ for it was a matter of *evidence*, that the committee were duly authorized to contract on behalf of the corporation, and that credit was given to it; whereas in *Taft v. Brewster et al.*, which came up on demurrer to the declaration, no evidence could be given upon these points, and the court held, as they well might, that the words "trustees, &c.," appended by the obligors to their names in the contract, was mere *descriptio personarum*; and in *Tippets v. Walker et al.* it expressly appeared in evidence, that the committee were not authorized to make the contract in question, and of course, like the agents of natural persons, under such circumstances, were personally liable upon it.⁴

With regard, therefore, to the *form* in which the agents of corporations must execute contracts, whether special or simple, in order to avoid personal liability and to bind their constituents, the general principle will be found the same as with the agents of nat-

¹ 19 Johns. R. 60; and see *McDonough v. Templeman*, 1 Har. & Johns. (Md.) R. 156.

² 9 Johns. R. 334; and see *Skinner v. White*, 13 Johns. R. 307.

³ 4 Mass. R. 595.

⁴ See *Mann v. Chandler*, 9 Mass. R. 336; *Randall v. Van Vechten*, 9 Johns. (N. Y.) R. 64, per Platt, J.; *Mott v. Hicks*, 1 Cowen, (N. Y.) R. 531, per Woodworth, J.; *McDonough v. Templeman*, 1 Har. & Johns. (Md.) R. 156; *Clark v. Benton Woollen Manufacturing Co.* 15 Wend. (N. Y.) R. 256.

ural persons ; that in general, if from the contract itself, or from this, coupled with the conduct of the parties thereto, it appears, that credit was given not to the agent, but to the *corporation*, and that it was the intent of the parties, that the corporation should be bound, whatever may be the particular form of the contract, the corporation is alone liable upon it.

§ 9. 1. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority.¹ This was the doctrine of the Roman Law ; and Wood, who cites the Digest, says, that “ corporations may borrow money by their syndick ; but if he borrows more than he had authority for, the community is not answerable for it, unless the money came to their use.”² Where the treasurer of a corporation was authorized by vote to hire money, on such terms and conditions as he might think most conducive to the interests of the company, for the purpose of meeting certain acceptances of the defendant, a director, of drafts of the company on him, the vote was held to authorize the treasurer to raise money by indorsing on behalf of the company drafts drawn by himself for that purpose ; and that, the acceptance of such drafts by the defendant, who was present at the meeting at which such vote was passed, and who was benefitted thereby, precluded him from disputing the authority of the corporation to pass the vote.³ The trustees of a society established for the purpose of erecting a monument and suitable buildings for their meetings, were au-

¹ *Essex Turnpike Corporation v. Collins*, 8 Mass. R. 299 ; *Mechanics Bank v. Bank of Columbia*, 5 Wheat. R. 337, per Johnson, J. ; *Clark v. Corporation of Washington*, 12 Wheat. R. 40 ; *Bank of U. S. v. Dandridge*, 12 Wheat. R. 83, per Story, J. ; *Hartford Bank v. Hart*, 3 Day, (Conn.) R. 493 ; *National Bank v. Norton*, 1 Hill, (N. Y.) R. 572 ; *State Bank of Indiana v. State*, 1 Black. (Ind.) R. 273 ; *Underhill et al. v. Gibson et al.* 2 New Hamp. R. 352 ; *Lee v. Flemingsburgh*, 7 Dana, (Ky.) R. 28 ; *Washington Bank v. Lewis*, 22 Pick. (Mass.) R. 24 ; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) R. 270 ; *Stewart v. Huntington Bank*, 11 Serg. & Rawle, (Penn.) R. 267, 269.

² Woods Civil Law, B. 1, ch. 2, p. 135 ; Dig. 12, 1, 27.

³ *Belknap v. Davis*, 1 Appleton, 19 Maine R. 455.

thorized by vote to appropriate the funds of the society to the erection of a suitable edifice, and were required by the by-laws to manage the finances and property of the society, and the trustees thereupon entered into a contract for the building, and having exhausted the funds of the society, and there remaining a debt for which they were personally responsible, voted that the treasurer should give a note to one of their number who had paid the debt, without limiting in the vote the time, within which the note was to be given ; it was held, that by virtue of their authority to manage the finances they had power to authorize the note, creating one debt to pay another, and that under their vote the treasurer might make the note several years afterwards, the claim not being then barred by lapse of time.¹ And where the directors of a manufacturing corporation authorized its agent, under the Massachusetts statute of 1808, ch. 65, to raise money for his own use on the credit of the corporation, and to give therefor "the company note ;" the words of the vote were held to authorize a bill of exchange drawn by the agent in the name of the company, the dishonor of which would not subject them to damages.² If a restricted authority is given to a special agent, a contract made by him without its limits will impose no obligation on his constituent. In accordance with this, where one was appointed the agent of a turnpike corporation to contract for the making of a certain portion of the road, with the restriction, that one third of the payment on such contracts was to be made in shares in the road, it was considered that a contract made by him without this stipulation, would not charge the corporation.³ If the officers, whose appropriate business it is to make loans for a corporation, make unlawful loans, the corporation is not bound by their acts.⁴ As, however, the appointment of an agent may be implied from the recognition of his acts, or the permission of his services, so may the extent of his authority from the powers usually given to one in his station. Upon this

¹ *Hayward v. Pilgrims Society*, 21 Pick. (Mass.) R. 270.

² *Tripp v. Swanzy Paper Company*, 13 Pick. (Mass.) R. 291.

³ *Hayden et al. v. Middlesex Turnpike Corporation*, 10 Mass. R. 403.

⁴ *Life & Fire Insurance Company v. Mechanics Fire Insurance Company*, 7 Wend. (N. Y.) R. 31.

principle it was held, that the general agent of a commission company, who was in the habit of accepting bills which were afterwards paid by the company, had power to accept bills on an expected delivery of goods, though the by-laws of the corporation conferred no such power in express terms upon him.¹

Where, however, a company which had existed as a voluntary association was afterwards incorporated, it was decided, that their general agent, who was authorized to sign notes on behalf of the corporation for debts due from the voluntary company for stock or money lent them, had no power to sign notes for the corporation given for the purchase money of a farm, the title of which was in the voluntary association; there being members of the former, who were not members of the latter body.² And generally, the president of a corporation is not, by virtue of his office, authorized to draw checks for the moneys of the corporation deposited in a bank, unless by the established usage of the place where the operations of the company are carried on, the presidents of such corporations are in the practice of drawing such checks, without any special authority for that purpose.³ In the case of *Stow v. Wyse*,⁴ the general agent of a manufacturing corporation was held by the Supreme Court of Errors in Connecticut unauthorized to sell or convey the real estate of the company, without specific authority; though it was admitted by the court, that it might be incidental to his power as agent, to borrow money, give promissory notes, and do many other acts in the ordinary course of the business of the company. The vice president of a manufacturing corporation, after it had become insolvent, gave a note to his clerk under the seal of the corporation for an alleged debt due from the corporation to himself, for the purpose of charging the stockholders of the company personally for the payment of the note. This note was not deemed evidence of a debt due from the company to the vice president, the officer

¹ *Munn v. Commission Co.* 15 Johns. (N. Y.) R. 44.

² *White v. Westport Cotton Manufac. Co.*, 1 Pick. (Mass.) R. 215.

³ *Fulton Bank v. N. Y. and Sharon Canal Co.*, 4 Paige, (N. Y.) Ch. R. 127.

⁴ 7 Conn. R. 219.

who had affixed the seal of the corporation thereto ; and the person, to whom he had assigned the note, could not recover the amount thereof after the dissolution of the corporation, without proving that it was given for a debt actually due.¹ But though a payment be made irregularly by the President of a corporation, yet if it be justly due, and there be no reason for withholding it, it cannot be recovered back, on the ground, that he had verbal directions merely from the directors to pay it.²

2. Bank charters usually confer on boards of directors full power to manage or conduct the affairs of the company.³ The directors are, however, but the agents of the corporation, and where their authority is limited by the act of incorporation, have clearly no power to bind their principal beyond it.⁴ If the general power of making by-laws regulating the transactions of the corporation remain in the body at large, the power of the directors may be circumscribed by them.⁵ A distinction has been taken in Massachusetts between acts of an agent for his principal in common cases, and similar acts done by the servants or officers of a corporation. In the first case, it is said, the extent of the authority is known only between the principal and agent ; whereas in the latter, the authority is created by statute, or is matter of record in the books of the corporation, to which all may have access who have occasion to deal with the officers.⁶ The restrictions upon the power of the agents or officers of a corporation contained in the act of incorporation, we can readily conceive, every person dealing with the company is bound to notice ; but whether this be true of every restriction made by a by-law upon the power of the *general* agents of the corporation, may, we think,

¹ *Bonafée v. Fowler*, 7 Paige, (N. Y.) Ch. R. 576.

² *New Orleans Building Company v. Lawson*, 11 Louisiana R. 34.

³ *Fleckner v. United States Bank*, 8 Wheat. R. 356, 357 ; *Ridgway v. Farmers Bank of Bucks County*, 12 Serg. & Rawle, (Penn.) R. 265.

⁴ *Salem Bank v. Gloucester Bank*, 17 Mass. R. 29, 30 ; *Lincoln and Kennebec Bank v. Richardson*, 1 Greenl. (Me.) R. 81.

⁵ *Ibid.*

⁶ *Wyman v. Hallowell and Augusta Bank*, 14 Mass. R. 58 ; *Salem Bank v. Gloucester Bank*, 17 Mass. R. 29.

admit of some doubt.¹ The directors of a bank alone have power to make discounts and fix the conditions of them.² They have, in general, authority to control all the property of a bank, and may authorize the President, or one of their number, to assign any of the securities belonging to the bank.³ They are not authorized, however, to pay money for a bank which it does not owe; and therefore, no acts of theirs, tending to create an obligation to that effect, can be operative. It was accordingly held, that if a banking company, incorporated by the same name as a former one, appoint the same President and Cashier, and the officers receive and issue the notes of the former company, and declare that there is no difference between the notes thus issued and those of the new company, the new company, never having authorized these proceedings, are not liable to pay such notes.⁴ A board of directors, authorized to conduct the affairs of the company, may empower the President and Cashier to borrow money, or to obtain a discount, for the use of the bank;⁵ but the President alone cannot derive such an authority from a resolve authorizing *him and the cashier* to borrow money.⁶ If, however, both agree on the plan of borrowing, it is unnecessary that both should sign the papers to carry it into effect.⁷ In Massachusetts it has been held that neither a President, nor a Cashier of a bank, has *ex officio* authority to transfer the property or securities of the company; but must have an express authority to that effect from the corporation at large, or the directors, as the case might be.⁸

¹ Wild v. Bank of Passamaquoddy, 3 Mason, C. C. R. 506.

² Bank of United States v. Dana, 6 Peters, R. 51; Bank of Metropolis v. Jones, 8 Peters, R. 16.

³ Spear v. Ladd, 11 Mass. R. 94; Northampton Bank v. Pepoon, 11 Mass. R. 288; and see § 2, part 2, of this Chapter.

⁴ Salem Bank v. Gloucester Bank, 17 Mass. R. 29; Lincoln and Keunnebec Bank v. Richardson, 1 Greenl. (Me.) R. 81.

⁵ Ridgway v. Farmers Bank of Bucks County, 12 Serg. & Rawle, (Penn.) R. 265; Fleckner v. United States Bank, 8 Wheat. R. 355, 356, 357.

⁶ Ridgway v. Farmers Bank, 12 Serg. & Rawle, (Penn.) R. 256.

⁷ Life and Fire Insurance Company, v. Mechanic Fire Insurance Company, 7 Wend. (N. Y.) R. 31.

⁸ Hallowell and Augusta Bank v. Hamlin et al., 14 Mass. R. 180; Hartford Bank v. Barry, 17 Mass. R. 97.

Neither, it is said, can the President or Cashier charge a bank with any special liability for a deposit, contrary to its usage, without the previous authority, or subsequent assent of the corporation.¹ In Massachusetts, however, it is admitted that a cashier has authority *ex officio* to endorse a note, the property of the bank, as a measure preliminary to a suit, and to authorize a demand upon the maker, and notice to the endorser.² These narrow limits on a cashier's *ex officio* power are, however, by no means acknowledged by the highest authority. On the contrary, it is said, that a cashier is usually entrusted with all the funds of a bank, in cash, notes, bills, &c., to be used from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes, and other property, when payments have been made. He draws checks from time to time, for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank in *paying or receiving debts, or discharging or transferring securities*, are to be conducted. It does not seem too much, then, to infer, *in the absence of all positive restrictions*, that it is his duty as well to apply the negotiable funds, as the moneyed capital of the bank, to discharge its debts and obligations.³ The inducement to the transfer need not appear; but the Courts will presume the transfer to have been properly made by the cashier, in the absence of proof to the contrary.⁴ This presumption is not, however, conclusive; and the transaction may be impeached by showing that it was not in the ordinary course of business, but in prejudice of the rights and interests of the bank.⁵ If the cashier of a bank should pay to

¹ Foster et al. v. Essex Bank, 17 Mass. R. 505.

² Hartford Bank v. Barry, 17 Mass. R. 97. The Cashier of the Bank of Kentucky has no authority *ex officio* to accept bills of exchange. Pendleton v. Bank, 1 Monroe, (Ky.) R. 179.

³ Fleckner v. United States Bank, 8 Wheat. R. 360, 361, per Story, J.; Ridgway v. Farmers Bank of Bucks County, 12 Serg. & Rawle, (Penn.) R. 265; Everett et al. v. United States, 6 Port. (Ala.) R. 166.

⁴ Everett et al. v. United States, 6 Port. (Ala.) R. 166.

⁵ Ibid.

a *bona fide* holder a forged check drawn on the bank, or forged bank bills, the payment cannot be recalled; because he is entrusted by the bank, with an implied authority to decide on the genuineness of the hand writing of the drawer of the check, and of the paper of the bank. The act of payment is to be distinguished, in this respect, from a mere admission.¹

Again, we are told, that the cashier of a bank is, *virtute officii*, generally entrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank, as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and endorse negotiable securities, held by the bank, for its use, and in its behalf; and no special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show, that it has interposed a restriction, and that such restriction is known to those, with whom it is in the habit of doing business.² The receipt of the cashier is evidence of a deposit, so as to charge the bank;³ and the State Bank of Illinois may take an appeal by its cashier.⁴

The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object, and to do any thing in relation thereto, that an attorney might lawfully do. His authority does not, however, extend so far as to justify him in altering the nature of the debt, or in changing the relation of the bank from that of a creditor, to that of an agent of its debtor; although a subsequent acquiescence of the bank in such an exercise of power may ratify

¹ *Levy v. Bank of United States*, 1 Binn. (Penn.) R. 27; *Bank of United States v. Bank of Georgia*, 10 Wheat. R. 333; *Salem Bank v. Gloucester Bank*, 17 Mass. R. 1; *Story on Agency*, § 115, p. 104, 105.

² *Wild v. Bank of Passamaquoddy*, 3 Mason, C. C. R. 506, per Story, J.

³ *State Bank v. Kain*, 1 Bre. (Ill.) R. 45; *State Bank v. Locke et al.*, 4 Dev. (N. C.) R. 533.

⁴ *Moreland v. State Bank*, 1 Bre. (Ill.) R. 205. An agent of a corporation, who is neither president, chief officer, cashier, treasurer, nor secretary,

and confirm it.¹ So, an agreement by the President and Cashier of a bank, that an endorser shall not be liable on his indorsement is not binding on the bank.² The directors alone have power to make discounts and fix the conditions of them; and the cashier can only bind the bank in the discharge of his ordinary duties.³

Independently of any *resolution* of the directors, their sanction to a draft made on the bank by the President may be inferred from circumstances.⁴ And where the President of a bank, who was authorized to raise money by drawing bills on its behalf, to be applied to its use, by fraud and collusion between himself and the payee of a bill drawn on the bank, raised money on it to be applied to the payee's use; it was considered that a *bona fide* indorsee, who had received it in the usual course of business, might recover thereon from the bank.⁵

3. If the agent of a corporation make a contract beyond the limits of his authority, he is bound himself, in the same manner as the agent of a natural person would be.⁶

4. If a corporation ratifies the unauthorized act of its agent, the ratification is equal to a previous authority, as in case of natural persons; no maxim being better settled in reason and law, than "*omnis ratihabitio retrohabetur, et mandato priori equiparatur*;" at all events, where it does not prejudice the rights of strangers.⁷

cannot, under the Pennsylvania statute of March 22, 1817, enter an appeal from an award of arbitrators, though authorized so to do by the directors. *Washington Company v. Cullen*, 8 Serg. & Rawle, (Penn.) R. 517.

¹ *Bank of Pennsylvania v. Reed*, 1 Watts & Serg. (Penn.) R. 101.

² *Bank of United v. Dana*, 6 Peters, R. 51; *Bank of Metropolis v. Jones*, 8 Peters, R. 16.

³ *Ibid.*

⁴ *Ridgway v. The Farmers Bank of Bucks County*, 12 Serg. & Rawle, (Penn.) R. 256.

⁵ *Ridgway v. Farmers Bank*, 12 Serg. & Rawle, (Penn.) R. 256.

⁶ *Salem Bank v. Gloucester Bank*, 17 Mass. R. 29, 30; *Thayer v. Boston*, 19 Pick. (Mass.) R. 516, 517; *Stow v. Wyse*, 7 Conn. R. 219; *Lee v. Flemingsburgh*, 7 Dana, (Ky.) R. 28; *Underhill et al. v. Gibson et al.*, 2 New Hamp. R. 352; *McClure et al. v. Bennet*, 1 Blackf. (Ind.) R. 190.

⁷ *Fleckner v. United States Bank*, 8 Wheat. R. 363, per Story J.; *Essex*

5. It is also well established, both in law and equity, that notice to an agent in the transactions for which he is employed is notice to the principal; for otherwise, where notice is necessary, it might be avoided in every case by employing an agent. The same principle applies equally to a corporation, as to a natural person.¹

In case of a joint agency, as of directors of a bank, knowledge of a material fact imparted by a director to the board at a regular meeting is notice to the bank.² Notice to either of the directors, *whilst engaged in the business of the bank*, is notice to the principal, the bank. Thus, where a bill of exchange was sent to one of the directors of a bank, to be discounted for the benefit of the drawer, and the director, who was a member of the board which ordered the discount, received the avails, alleging the discount to have been made for his benefit, the bank was held chargeable with knowledge of the fraud, and could not recover on the bills against the drawer.³

Where, however, a director is not engaged in the business of the bank notice to him will not be deemed notice to the bank. Thus, when one of the directors of a bank who were authorized, *when money was abundant*, to solicit and procure notes for discount, obtained a note under pretence of getting it discounted

Turnpike Corporation v. Collins, 8 Mass. R. 299; Hayden et al. v. Middlesex Turnpike Corporation, 10 Mass. R. 403; Salem Bank v. Gloucester Bank, 17 Mass. R. 28, 29; White v. Westport Cotton Manufac. Co. 1 Pick. (Mass.) R. 220; Bulkley v. Derby Fishing Co, 2 Conn. R. 252; S. P. Witte v. Same, Ibid. 260; Bank of Pennsylvania v. Reed, 1 Watts & Serg. (Penn.) R. 101; Hayward v. Pilgrim Society, 21 Pick. (Mass.) R. 270; Everett et al. v. United States, 6 Port. (Ala.) R. 166.

¹ Lawrence v. Tucker, 7 Greenl. (Me.) R. 195; Bank v. Whitehead, 10 Watts, (Penn.) R. 397.

² Bank v. Whitehead, 10 Watts, (Penn.) R. 397; Ex parte Holmes, 5 Cow. (N. Y.) R. 426; Fulton Bank v. N. Y. and Sharon Canal Co., 4 Paige, (N. Y.) Ch. R. 136.

³ Bank of the United States v. Davis, 2 Hill, (N. Y.) R. 451; and see Fulton Bank v. Benedict, 1 Hill, (N. Y.) R. 480; Washington Bank v. Lewis, 22 Pick. (Mass.) R. 24, 31; Fulton Bank v. N. Y. and Sharon Canal Company, 4 Paige, (N. Y.) Ch. R. 136.

for the maker, *at a time when money was scarce*, and pledged it to the bank for a loan to himself, and the maker knew that the director was authorized by the bank to procure notes for discount only when money was abundant, it was held that the director had exceeded his authority in the transaction, and that the bank was not bound by his fraudulent conduct ; and that as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he received the note, and might recover of the maker.¹

Notice of a dissolution of copartnership published in a newspaper, and thus accidentally reaching a bank director, is not equivalent to actual notice to the bank ; though perhaps if notice of such a dissolution had been given to him, for the express purpose of being by him communicated to the bank, it would have been sufficient notice to the bank.² It seems that where actual notice of dissolution of a copartnership is necessary, proof that the party, as a bank, sought to be charged with it, took a newspaper in which the notice was published, is a fact from which the jury are authorized to infer actual notice,³ but is not *per se* equivalent to actual notice.⁴ The circumstance, that the indorser of a note was a director in the bank in which it was discounted, will not be deemed constructive notice to the bank that the note was made for his accommodation.⁵ A subsequent board of directors is to be considered as knowing all the circumstances communicated or known to a previous board. Thus, upon a transfer of bank stock to one, notice to the board of directors, that he held it as trustee only, was deemed to be notice to the bank ; and no

¹ *Washington Bank v. Lewis*, 22 Pick. (Mass.) R. 24.

² *National Bank v. Norton*, 1 Hill. (N. Y.) R. 578, 579, 580; and see *Fulton Bank v. N. Y. and Sharon Canal Company*, 4 Paige, (N. Y.) Ch. R. 136.

³ *Bank of South Carolina v. Humphreys*, 1 McCord, (S. C.) R. 388; *Martin v. Walton*, *Ibid.* 16; and see *Greene v. Merchants Insurance Company*, 10 Pick. (Mass.) R. 402, 406, 407.

⁴ *Vernon v. Manhattan Company*, 17 Wend. (N. Y.) R. 524, 527; *S. C. on Error*, 22 *Ibid.* 183, 191, 192; and see *Rowley v. Horne*, 3 Bing. R. 2; *National Bank v. Norton*, 1 Hill, (N. Y.) R. 578, n. a.

⁵ *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) R. 270.

subsequent change of directors could render necessary new notice of the fact.¹ Knowledge of facts by a mere stockholder in an incorporated manufacturing company, or bank, is not notice to the corporation of the existence of those facts.²

The representations, declarations, and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual. To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to do or make.³ The cashier of a bank possesses no incidental power to make any declarations binding upon the bank, not within the scope of his ordinary duties. He has no authority, upon a note being offered for discount, to bind the bank by his declaration to a person about to become an indorser on it, that he will incur no risk or responsibility by his becoming an indorser upon such discount.⁴ His promise to pay a debt which the corporation did not owe, or his admission that the forged bills of the bank were genuine, would not bind the bank, unless it had authorized or adopted his act.⁵ The mere admissions of a director or stockholder of a corporation are not, it seems, evidence against the corporation, even though they cannot be compelled to testify on account of their interest.⁶

¹ *Mechanics Bank of Alexandria v. Seton*, 1 Peters, R. 299; *Fulton Bank v. N. Y. and Sharon Canal Co.* 4 Paige, (N. Y.) Ch. R. 136.

² *Housatonic and Lee Banks v. Martin*, 1 Metcalf, (Mass.) R. 294; *Fairfield Turnpike Company v. Thorp*, 13 Conn. R. 182.

³ *Fairfield County Turnpike Company v. Thorp*, 13 Conn. 173; *Stewart v. Huntington Bank*, 11 Serg. & Rawle, (Penn.) R. 267, 269; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) R. 270; *Sterling v. Marietta Company*, 11 Serg. & Rawle, (Penn.) R. 179.

⁴ *Bank of United States v. Dana*, 6 Peters, R. 51; *Bank of Metropolis v. Jones*, 8 Peters, R. 12.

⁵ *Salem Bank v. Gloucester Bank*, 17 Mass. R. 1; *Story on Agency*, § 114, 115, p. 103, 104, 105.

⁶ *Fairfield County Turnpike Company v. Thorp*, 13 Conn. R. 173; *Hartford Bank v. Hart*, 3 Day, (Conn.) R. 494; *Osgood v. Manhattan Bank*, 3 Cowen, (N. Y.) R. 623; *Polleys v. Ocean Insurance Company*, 2 Shepley, (Me.) R. 141; *Ruby v. Abyssinian Society*, 15 Maine R. 306; *National*

§ 10. As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent.

A bank is liable for the fraud or mistakes of its cashier or clerk in the entries in its books, and in the false accounts of deposits,¹ and for improperly refusing *by its directors* to permit an individual to subscribe for,² or to transfer stock.³ And where, by contract made through its President or agent, a corporation, established for the purpose of pressing cotton, agreed to unload a boat, and the company's slaves took possession of it for that purpose, and carelessly sunk it, the corporation was held responsible for the damages.⁴ And generally a corporation is civilly responsible for damages occasioned by an act, as a trespass, or a tort, done at its command, by its agent, in relation to a matter within the scope of the purposes for which it was incorporated.⁵ It is not, however, responsible for unauthorized, and unlawful acts even of its officers, though done *colore officii*. To fix the liability, it

Bank v. Norton, 1 Hill, (N. Y.) R. 579, and authorities above. See also Chap. XVIII. § 8.

¹ Salem Bank v. Gloucester Bank, 17 Mass. R. 1; Gloucester Bank v. Salem Bank, *Ibid.* 33; Foster et al. Ex'ors. v. The Essex Bank, *Ibid.* 479; Manhattan Company v. Lydig, 4 Johns. (N. Y.) R. 377; and see Chap. VIII. of Contracts, and Chap. XI. of Capacity of a Corporation to sue, and its liability to be sued.

² Union Bank v. McDonough et al., 5 Louisiana R. 63; and see Ware v. Barataria and Lafourche Canal Company, 15 Louisiana R. 168.

³ Chap. X. § 8.

⁴ Marlatt v. Levee Steam Cotton Press Company, 10 Louisiana R. 583.

⁵ Duncan v. Surry Canal Proprietors, 3 Starkie, 50; Smith v. Birmingham Gas Company, 1 Adolph. & Ellis, 526; 3 Nev. & M. 771; Rex v. Medley et al., 6 C. & P. 292, Denman; Hawkins v. Dutchess and Orange Steamboat Company, 2 Wend. (N. Y.) R. 452; Beach v. Fulton Bank, 7 Cow. (N. Y.) R. 485; Kneass v. Schuylkill Bank, 4 Wash. C. C. R. 106; Lyman v. White River Bridge Company, 2 Aik. (Vt.) R. 255; Rabassa v. Orleans Navigation Company, 3 Louisiana R. 461; Goodloe v. City of Cincinnati, 4 Ohio R. 513; Smith v. Same, *Ibid.* 414; McCready v. Guardians, &c. 9 Serg. & Rawle, (Penn.) R. 94; Hamilton County v. The Cincinnati and Wooster Turnpike Company, Wright, (Ohio) R. 603; Riddle v. Prop'rs, &c., 7 Mass. R. 187; Thayer v. Boston, 19 Pick. (Mass.) R. 516, 517.

must either appear, that the officers were expressly authorized to do the act, or that it was done *bona fide* in pursuance of a general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation.¹

On the other hand, the officer or agent of a corporation is liable to the corporation for all damages, occasioned by his violation of the duties and obligations he owes to his principal, whether it consists in positive misconduct, or neglect, or omissions. The directors of a moneyed institution are responsible to it, in an action in the case, for improperly obtaining and disposing of the funds or property of the company.² They are liable, however, only *individually* and severally, and not jointly as directors, unless the act complained of be done by a majority of the board of directors, when by the act of incorporation, a majority only is competent to transact the business of the company.³ And generally where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit in equity may be brought by, and in the name of, the corporation, to compel them to account for such waste or misapplication.⁴ But as a Court of Equity never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of a corporation refused in such case to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant.⁵ And if the stockholders were so numerous as to render it impossible, or very inconvenient to bring them all before the court, a part might file a bill, in behalf of themselves and all others standing in the same situation.⁶ The jurisdiction of chancery, in such cases, proceeds

¹ *Thayer v. Boston*, 19 Pick. (Mass.) R. 516, 517, per Shaw C. J.

² *The Franklin Insurance Company v. Jenkins*, 3 Wend. (N. Y.) R. 130

³ *Ibid.*

⁴ *Robinson v. Smith*, 3 Paige, (N. Y.) Ch. R. 233, per Walworth, Chan.

⁵ *Ibid.*

⁶ *Ibid.* and see *Hichens v. Congreve*, 4 Russ. 562.

in case of joint stock corporations, upon the same principles applied to charitable corporations in England. The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation. And no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity be suffered to pass without a remedy.¹ But where an incorporated company had engaged in unauthorized and illegal transactions, a stockholder, who has acquiesced therein, by knowingly participating in the profits of such transactions, will not be allowed to charge the directors personally for an eventual loss arising therefrom.²

The relation of *cestuis que trust* and trustees does not exist between the stockholders of an incorporated company and the corporation; nor are they in the relative situation of partners; nor are the stockholders creditors of the company.³ The company is the mere creature of the law, a politic, and not a natural body, made up by the compact entered into by the stockholders, each of whom becomes a corporator identified with, and forming a constituent part of, the corporate body.⁴ Hence, when there is a fraudulent purchasing of the stock of a company by its officers with the company funds, the remedy is not against the latter in its corporate character, but against the directors, by whom the fraud may have been committed, or through whose management the loss has been sustained.⁵

The officers and agents of a corporation are liable for losses and defalcations occasioned by their neglects, as well as by their positive misconduct.⁶ It should be observed, however, that

¹ Robinson v. Smith, 3 Paige, (N. Y.) Chan. R. 232, per Walworth; and see Wood, Inst. B. 1, ch. 8, p. 110; 11 Co. R. 98 b.; and Verplanck v. Mercantile Insurance Company, 1 Edwards (N. Y.) Chan. R. 34; Scott v. Depeyster, 1 Edwards (N. Y.) Chan. R. 513.

² Scott v. Depeyster, 1 Edwards (N. Y.) Chan. R. 513.

³ Verplanck v. Mercantile Insurance Company, 1 Edwards (N. Y.) Chan. R. 87, per McCoun, Vice Chancellor.

⁴ Ibid.

⁵ Ibid.

⁶ Percy v. Millauden et al. 3 Louisiana R. 568; Pontchartrain Rail Road Company v. Paulding, 11 Louisiana R. 41.

though loss accrue to the funds of an incorporated company through a mere error on the part of the directors, they are not personally liable unless there has been negligence or fraud. No man, who takes upon himself an office of trust or confidence for another, or the public, contracts for any thing more than a diligent attention to its concerns, and a faithful discharge of its duties. He is not supposed to have attained infallibility, and does not therefore stipulate, that he is free from error.¹ The directors of an incorporated company must take the same care, and use the same diligence as factors or agents. They are answerable not only for their own fraud and gross negligence, but as they are usually interested in the stock, and act in relation to a bailment of the corporate funds to them, beneficial to both parties, they must answer for "ordinary neglect," or the omission of that care which every man of ordinary prudence takes of his own concerns.² Upon these principles, it is evident, that in the appointment of officers and agents for the company, as a secretary, they do not become sureties for their fidelity and good behavior. If they select persons to fill subordinate situations, who are known to them to be unworthy of trust, or of notoriously bad character, and a loss by fraud or embezzlement ensues, a personal liability rests upon them. But if this be not the case, they have a right to repose confidence in their secretary in every thing within the scope of his duties.³ Accordingly, where the secretary of an insurance company embezzled its funds, by altering checks and keeping back money received to be deposited; and whenever information was required, produced forged bank books, the entries in the books of the company being regularly made, as if he had actually made the deposits, and had thus, from time to time, passed his accounts with committees appointed to examine them; and it appeared, that the general conduct and investigation of the directors were the same pursued in other companies by prudent men, on a bill filed by a stockholder against the directors personally, it was held, that they were not liable on account of such fraud and embezzlement.⁴ But where it was the duty of the

¹ *Scott v. Depeyster*, 1 Edwards (N. Y.) Chan. R. 513.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

President of a railroad company to take a bond for the security of the company from the Secretary, which he neglected to do, he was held liable for the defalcations of the Secretary to the amount of the bond, which it was his duty to take.¹

Indeed, whether we consider their mode of appointment or of action, their powers, rights, and liabilities, or the liabilities and rights of their constituents, by virtue of their acts or contracts, we can perceive no difference in principle or precedent, between the agents of corporations, and those of natural persons, unless expressly made by the act of incorporation or by-laws.

§ 11. With regard to the general right of a factor or agent of a corporation, to maintain an action in his own name on contracts made directly with him, or for injuries done to the property of the corporation in his possession, we can perceive no reason in principle for a distinction in this particular between him and the factor or agent of a natural person. Such a factor or agent, equally with the factor or agent of a natural person, could avail himself, in a case to which they apply, of the principles of commercial law applicable to merchants and their factors in this respect. In general, however, where a contract is made through an agent with a corporation, the action must be brought in the name of the corporation,² and this will especially hold, as a matter of policy, in case of the agent of that greatest of all corporations, a State.³ And where certain members of a turnpike corporation agreed in writing to pay to the agent of the corporation, or order, all assessments made by the corporation on their shares, it was held by the Supreme Court of Massachusetts, that no action could be maintained upon this undertaking in the name of the agent, but that it must be brought in the name of the corporation.⁴

¹ *Pontchartrain Rail Road Company v. Paulding*, 11 Louisiana R. 41.

² *Binney et al. v. Plumley*, 5 Vermont R. 500.

³ *Irish v. Webster et al.* 5 Greenl. (Me.) R. 172, 173.

⁴ *Worcester Turnpike Corporation v. Willard*, 5 Mass. R. 80; *Gilmore v. Pope*, 5 Mass. R. 491; *Taunton and South Boston Turnpike v. Whiting*, 10 Mass. R. 336.

§ 12. The agents of a corporation, like the agents of a natural person, are entitled in legal presumption to be paid for their services by the principal, the corporation, what they are reasonably worth. The officers of a corporation, who are to receive any compensation, are usually provided for by regular salaries. Where there is no salary, and no particular contract, much must depend, as in other cases, upon the custom with regard to compensation for the particular services, and the expectation of the parties growing out of it. Where the law required a bank to appoint a clerk, and the records showed his appointment, but did not show any fixed salary provided for him, it was held that he might recover for his services in assumpsit *quantum valebant*.¹ Directors of corporations, and even of companies incorporated for the purpose of making profit, as banks, insurance, gas companies, and the like, are not usually compensated for their ordinary services as directors. Thus the directors of a gas company in England were not considered servants of the company in such a sense, as to be entitled to remuneration for their labor as directors, according to its value, and even a resolution of the company, not valid under the act of incorporation as a by-law, to allow them a stated compensation, was not considered a contract for compensation, even if as a contract it would have been available.² The charters of banks sometimes provide expressly, "that no director shall be entitled to any emolument, unless the same shall have been allowed by the stockholders at a general meeting."³ Such a clause, however, is not construed to deprive directors of compensation for services rendered to the bank while they are directors, if they are not rendered in their capacity as such.⁴ But where a director renders extra services to the corporation, and presents no account, and makes no claim for compensation, during eight years thereafter, and continues director during that time, he cannot recover on an implied promise to pay.⁵

¹ Waller v. Bank of Kentucky, 3 J. J. Marsh. (Ky.) R. 206.

² Dunston v. Imperial Gas Company, 3 B. & Adolph, 125.

³ Chandler v. Monmouth Bank, 1 Green, (N. J.) R. 255.

⁴ Ibid.

⁵ Utica Insurance Company v. Bloodgood, 3 Wend. (N. Y.) R. 652.

A cashier of an insolvent bank has no lien, in New York, on the funds of the bank for his salary, but must come in as an ordinary creditor.¹ A clergyman entered into a contract with a vestry, who were not legally elected, but were yet a vestry *de facto*, for a year's service, in ignorance of the illegality of the election and without collusion, and having performed the service, was held entitled to recover of the church upon his contract.² In the ensuing year the same clergyman entered into a contract with the same vestry, after he was apprised of the illegality of the election, and the court upon the ground of collusion, decreed a perpetual injunction against any suit for services for that year.³ A manufacturing corporation, whose duration was not limited by its charter, agreed with a stockholder, that during the time for which the corporation was established, he should devote his whole time and skill to its service in carrying on the business of the company, and be paid a yearly salary so long as he should perform such service, and that on his death, or refusal to perform the service, the corporation should be discharged from its obligation to employ him. The agent commenced his services under this agreement, but the business proving unprofitable, a majority of the stockholders, after the lapse of more than four years, voted to dissolve the corporation. The agent was accordingly dismissed, and the corporate property transferred to trustees, who were authorized to pay debts and distribute the surplus amongst the stockholders, and notice was given to the Governor, under the statute, that no further interest was claimed in the charter. Upon this state of facts, the court held, that the agent was released from his obligation to serve the company, but that he was entitled to an indemnity for the loss sustained by its refusal to employ him.⁴

§ 13. 1. When a corporation has sustained loss by the fraud, embezzlement, or other misconduct of a corporate officer or agent

¹ Bruyn v. Receiver &c. 9 Cowen, (N. Y.) R. 413, note.

² The Vestry of St. Luke's Church v. Matthews, 4 Dess. (S. C.) Chan. R. 578.

³ The Vestry of St. Luke's Church v. Matthews, 4 Dess. (S. C.) Chan. R. 578.

⁴ Revere v. Boston Copper Company, 15 Pick. (Mass.) R. 351.

of trust, it frequently becomes a question of great moment to it, whether the sureties on the bond, usually required as an indemnity against losses of this nature, are liable thereon. We have already briefly considered what species of security may in general be taken,¹ that its acceptance by the corporation may in proper cases be presumed,² and that the taking of such a bond is not, in general, necessary to the complete appointment of the officer required to give it;³ and it now remains for us to present such farther decisions upon this subject, as its interesting nature demands. Where an act incorporating certain banks authorized the directors to make by-laws for the government of the banks, and made it the duty of the directors to take such security for the good behavior of the officers as the by-laws should prescribe; and a by-law of the directors declared, that the cashier should give bond to the bank in a certain sum, with one or more sureties to be approved by the board, and "the first book-keeper in six thousand dollars;" a bond given by the two sureties for the first book-keeper, and accepted by the board, was held binding upon the sureties, *although the book-keeper himself was not joined in the bond.*⁴ A bank was incorporated with power to appoint all necessary officers, to take bonds from them, and to make all necessary by-laws, rules, and regulations. By one of the by-laws it was provided, that it should be the duty of every other officer of the bank to perform such services, as might be required of them by the President and Cashier. In an action against the principal and sureties of a bond given by a book-keeper of a bank, conditioned for the faithful performance of the duties of his office "*and of all other duties required of him in said bank,*" the bond was adjudged to have been taken in conformity with the charter; and the book-keeper having, whilst in discharge "of the other duties required of him," taken large sums of money, the sureties were rendered

¹ See Chap. on Contracts, *supra* § 10.

² See Chap. on Contracts, *supra* § 8, part 3.

³ See This Chap. § 3, parts 2 & 3.

⁴ *Bank of Northern Liberties v. Cresson*, 12 Serg. & Rawle, (Penn.) R. 306; and see *Greenfield et al. v. Yeates et al.*, 2 Rawle, (Penn.) R. 158; *Commonwealth v. Lamkin*, 1 Watts & Serg. (Penn.) R. 263.

liable on his bond.¹ A condition in a cashier's bond "to account for, settle, and pay over all money, &c.," is equivalent to a condition "for good behavior;" and if it were not, a clause in the charter prescribing the latter condition is only enabling, and does not preclude the insertion of the former condition.² Where it is a cashier's duty to be sworn before entering on the performance of his official business, his bond is not avoided in favor of the sureties by his omission to be sworn, but such omission is rather a breach of the condition of the bond, "to perform all the duties of cashier."³ A bank, authorized to make by-laws, and to take bond from the cashier for the "faithful discharge of the duties of his office," may take a bond with condition, that he shall perform the duties of his office according to law and the by-laws of the institution, and that he shall not make known any secrets, or the state of the funds, &c. to any person, except the directors, &c.; and as these terms may be required of the cashier by the by-laws, they may be inserted in the bond.⁴ A bond "well and truly to execute the duties of cashier or teller, or words tantamount, includes and secures not only honesty, but reasonable skill and diligence, on the part of such an officer. If therefore he perform the duties of his office negligently and unskilfully, or if he violate them for want of capacity, the condition of his bond is broken, and his sureties are liable for his misdoings.⁵ In *Union Bank v. Clossey*,⁶ the condition of a bond, that a clerk in the bank "should well and faithfully perform the duties assigned to, and the trust reposed in him, as first teller," was held to apply to his honesty, and not to his ability; and his sureties were declared not

¹ *Planters Bank v. Lamkin*, R. M. Charlton, (Ga.) R. 29.

² *State Bank v. Locke*, 4 Dev. (N. C.) R. 529; see *Jones v. Woollam*, 1 D. & R. 393; 5 B. & A. 769; 2 Chit. 322.

³ *State Bank v. Chetwood*, 3 Halst. (N. J.) R. 1.

⁴ *Bank of Carlisle v. Hopkins*, 1 Monr. (Ky.) R. 245.

⁵ *Minor v. Mechanics Bank*, 1 Peters, R. 46; *State Bank v. Chetwood*, 3 Halst. (N. J.) R. 25; *Barrington v. Bank of Washington*, 14 Serg. & Rawle, (Penn.) R. 405; *American Bank v. Adams*, 12 Pick. (Mass.) R. 303; *State Bank v. Trotter*, 3 Dev. (N. C.) R. 535, 536; *State Bank v. Locke*, 4 Dev. (N. C.) R. 529.

⁶ 10 Johns. (N. Y.) R. 271.

to be responsible for a loss arising from his mistake in paying a check. This decision is doubted in *State Bank v. Trotter*,¹ unless all that is meant is, that such a bond does not guaranty against *all* mistakes, or imply the utmost, and perfect, but only reasonable skill and diligence. It is agreed in such a case, that if the teller conceal deficiencies that at first arose from mistake, and make false entries in the books for the purpose of concealment, it is a breach of the bond, and that the sureties are liable for the loss sustained in consequence of such fraudulent conduct.² Such words clearly include, too, the omission of the plain duty of entering in the books of the bank a credit to a customer's account, by means of which omission the cashier escaped being charged for the sum, and retained the amount to his own use, until long afterwards found out.³ A bond for the faithful performance of the duties of the office of teller or cashier covers all defaults in the duties of such office, annexed from time to time by those who are authorized to control the affairs of the bank; and the sureties enter into the contract in reference to the rights and authority of the president and directors, under the charter and by-laws.⁴ Where a cashier exceeded his powers by changing the securities of the bank, his sureties were held liable; but the measure of damages, in a suit on the bond, was not the absolute amount of the securities, but the probable amount that would have accrued from them, had they not been changed.⁵ Where a statute prohibited any bank from issuing bills payable at any place, except at the bank, and a cashier, upon receiving bills not proved to have been issued after the statute was passed, the bills having been paid and taken up by another bank at which they were made payable, put them again in circulation for his own use; this was held a breach of his bond for the faithful performance of his duties, for which his sureties were liable.⁶ If a cashier permit a

¹ 3 Dev. (N. C.) R. 535, 536.

² *Union Bank v. Clossey*, 11 Johns. (N. Y.) R. 182.

³ *State Bank v. Locke*, 4 Dev. (N. C.) R. 529.

⁴ *Minor v. Mechanics Bank*, 1 Peters, R. 46; *Planters Bank v. Lamkin*, R. M. Charlton, (Ga.) R. 29.

⁵ *Barrington v. Bank of Washington*, 14 Serg. & Rawle, (Penn.) R. 405.

⁶ *Dedham Bank v. Chickering*, 4 Pick. (Mass.) R. 314.

transfer of stock to be made to the bank beyond the amount permitted by the charter, he and his sureties are answerable to the stock-holders on his bond, for any loss caused thereby, although such transfer was authorized by a resolution of the directors.¹ Indeed, no act or vote of the directors of a bank, contrary to their duties, and in fraud of stock-holders' rights and interests, will excuse the cashier or his sureties from a violation of the stipulation in his bond, well and truly to execute the duties of his office.² Where it was the duty of a cashier to forward to the state treasurer the duties on dividends declared by the bank, he and his sureties were held answerable on his bond for his omission so to do, to the amount of the injury thereby necessarily sustained by the bank.³ A cashier, who receives money for deposit out of the bank, and not in banking hours, or receives its funds at places distant from the bank, and does not account for them, is, together with his sureties, liable therefor on his official bond.⁴ And when he applies the notes of the bank to his own use, he is liable for the full nominal amount, and cannot avail himself of their depreciation.⁵ Where a cashier, before his reappointment to office, had misapplied the funds of the bank, and after his reappointment borrowed money, as cashier, and placed it in the bank, to conceal his delinquency, and afterwards returned the money so borrowed, and was dismissed as a defaulter, the sureties on his last bond were held answerable; as the money, that he so placed in bank, became the property of the bank, and his subsequent conduct was a breach of the condition of his bond.⁶ Where the landlord of a public house had given a bond to deliver to the committee of a Friendly Society the box, at all times, when required by a majority of the society at one of their annual or quarterly meetings, "or, by their committee for the time being," and likewise to render a just and true account "accord-

¹ Bank of Washington v. Barrington, 2 Penn. R. 27.

² Minor v. Mechanics Bank, 1 Peters, R. 46.

³ Bank of Washington v. Barrington, 2 Penn. R. 27.

⁴ Pendleton v. Bank of Kentucky, 1 Monr. (Ky.) R. 177.

⁵ Ibid.

⁶ Ingraham v. Maine Bank, 13 Mass. R. 208.

ing to the rules, orders, and regulations of the society, and of the said act of Parliament, and of the said bond," the latter words were held not to qualify the power of the committee to demand the box, &c., and a refusal to comply with their request to do so was deemed a breach of the condition of the bond, it having been shown that the committee had been duly elected by a majority of the society at their annual meeting.¹

2. A cashier's bond, with condition "safely to keep all moneys," &c. does not render the obligor responsible for money violently robbed from him while in the discharge of his duty.² Where a bond was given by an assistant of a bank, for the faithful discharge of the duties of his office, the sureties on the bond were not held responsible for moneys taken by their principal, and from the teller's drawer, without his consent or knowledge, the accountant not being intrusted with any moneys of the bank, nor put in possession of them, as accountant; or, in other words, were not held responsible for his thefts.³ Neither were the sureties held responsible for the cashier's embezzlements of new bills, made by consent of the directors, and intended to be privately kept and surreptitiously issued by him in direct violation of law; such bills not being intended to make a part of the ostensible funds of the bank, nor entered on the books, nor noticed in the half-yearly returns to the Governor and Council.⁴ Nor are a cashier's sureties liable on his bond, for his not accounting to the bank for their money collected by him as an attorney at law;⁵ nor for his surreptitiously conveying his shares in the bank to a third person, by means of blank certificates signed by the president, and deposited in the cashier's hands, though he had previously pledged the shares to the bank as security for the payment of his note.⁶ In such case, however, it was held, that the bank might apply towards the payment of the cashier's notes, a balance standing on

¹ *Wybergh v. Ainley*, McClel. 669; McClel. & Y. 660.

² *Huntsville Bank v. Hill*, 1 Stew. (Ala.) R. 201.

³ *Alison v. Farmers Bank*, 6 Rand. (Va.) R. 204.

⁴ *Dedham Bank v. Chickering*, 4 Pick. (Mass.) R. 314.

⁵ *Ibid.*

⁶ *Ibid.*

its books in his favor, instead of applying it for the sureties' benefit, in reducing damages for breach of the bond.¹

3. In order to charge a cashier's sureties, it is not necessary to give them notice of his defaults, and retaining him in office after knowledge of his defalcation does not excuse his sureties from liability for *previous* defaults.² But if the law require his removal for ascertained delinquency, and the managers of the bank retain him in service after knowing such cause of removal, and connive at his misconduct, his sureties are not liable for any breach of his bond, which took place subsequent to the discovery of his misdoings.³ Knowledge of the cashier's delinquency, and connivance at it on the part of the directors of the branch, at which he is cashier, will not, it seems, avail in defence against a suit on his bond by the principal bank; as it is not a legal presumption, that what is known to the branches, is communicated to the principal bank.⁴

4. Where the bond itself limits the period of the liability of the sureties, there can be no question concerning it. And though the bond contain no express limitation of this kind, if it recite the duration of the principal's agency or office, such recital showing that the parties must have contracted with a view to that period, it was long since settled, and upon the maturest consideration, that the sureties are not responsible for the conduct of the principal beyond it, as upon a new appointment; even though the bond stipulate for "all the time the principal shall continue" in his office or agency.⁵ Again, though the bond does not recite the term of the office or agency, if it be one of limited duration, by general statute, charter, by-law, or terms of appointment, the parties are still supposed to contract with a reference to the limited term, and the sureties will not be held answerable for the misconduct of the principal beyond that term, upon a new appoint-

¹ Ibid.

² *State Bank v. Chetwood*, 3 Halst. (N. J.) R. 28.

³ *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. (Ky.) R. 568.

⁴ Ibid.

⁵ *Lord Arlington v. Merricke*, 2 Saund. R. 404; *Liverpool Water Works Co. v. Atkinson*, 6 East, R. 507.

ment, even though the *words* of the bond are that they shall be responsible for the principal, "*at all times*, or any time thereafter." If, on the other hand, the office or agency be not of limited duration, but at pleasure, or until removal, unless the bond otherwise stipulate, the sureties are bound while the principal continues in office, even though there may have been unnecessary re-elections.² But where a bank charter limits the duration of a bank to a certain period, and a bond is given to secure the cashier's good conduct, the bond must have the same limitation; and the surety is not liable for a breach of it by the cashier, after that period, though the charter be extended by the legislature beyond the first limitation.³ In *Exeter Bank v. Rogers et al.*,⁴ however, the same question arose and was decided against the sureties; the learned and ingenious Counsel for the bank, amongst other points, taking a distinction between cases where the charter had expired before renewal, and those where the charter was renewed before expiry, which was the case before him. The court do not, however, advert to this distinction in their opinion; but profess to go on the general ground, that where the office is held at the will of those who appoint to it, if nothing appear to the contrary, the bond is presumed to be intended to cover all the time the person appointed shall continue in office under his appointment, and that the extension of the charter by the proper

¹ *The Wardens of St. Saviour's, Southwark v. Bostock*, 2 New. R. 174; *Hasel and another v. Long and another*, 2 Mau. & Sel. 363; *Peppin v. Cooper*, 2 Barn. & Ald. 431; *Barker v. Parker*, 1 T. R. 295; *Anderson v. Longden*, 1 Wheat. R. 91; *United States v. Kirkpatrick*, 9 Wheat. R. 720; *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, (Md.) R. 413, 429; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 341; *Bigelow v. Bridge*, 8 Mass. R. 275; *Exeter Bank v. Rogers et al.*, 7 New Hamp. R. 33.

² *Curling v. Chalklen*, 3 Maule & Sel. 502; *Anderson v. Longden*, 1 Wheat. R. 85; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) R. 335; *Union Bank v. Ridgeley*, 1 Harris & Gill, (Md.) R. 413, 429; *Exeter Bank v. Rogers*, 7 New Hamp. R. 33.

³ *Union Bank of Maryland v. Ridgeley*, 1 Har. & Gill, (Md.) R. 413, 429; *Thompson v. Young et al.*, 2 Ham. (Ohio) R. 334; 1 Ohio Cond. R. 383, S. C.; and see *Barker v. Parker*, 1 T. R. 295.

⁴ 7 New Hamp. R. 33.

authorities may fairly be presumed to enter into the contemplation of the parties, at the time of giving a bond of continuing, and in point of time, unlimited obligation.¹ It would be difficult to reconcile this decision with the cases in Maryland and Ohio,² either upon the distinction above adverted to, or any other, or with the general current of authorities respecting the obligations of sureties. Where a charter was forfeited by a cashier's omission to forward to the state treasurer the duties on dividends declared by the bank, as required by law, and by a subsequent statute, the charter "was revived and continued in as full force and ample a manner as if no forfeiture had taken place," it was adjudged that his sureties were not liable for his defaults which occurred after the passing of that statute.³ Where a bank, pursuant to its by-laws, required the cashier to renew his bond, and the order requiring the renewal provided that the previous bond should not be impaired, until given up to be cancelled, the first bond, remaining uncanceled, was held to be in force as security to the bank, until the second was executed.⁴ A cashier's sureties were held liable, until the time of his being discharged from office, though the order for his discharge (which was given upon the discovery of his breach of trust,) was received on Sunday morning, and was not executed until the afternoon of the next day.⁵

5. A misnomer of the corporation in the official bond of a cashier, by the omission of the words "and company," does not vitiate the bond.⁶ Where in debt on such a bond, the defendant, on oyer, set forth a bond which recited, that "C. is cashier," he was estopped from denying the fact of C.'s being cashier, properly appointed and qualified for all the purposes of the suit.⁷

¹ Ibid. per Richardson, C. J.

² *Union Bank v. Ridgeley*, 1 Har. & Gill, (Md.) R. 413, 429; *Thompson v. Young et al.*, 2 Ham. (Ohio) R. 334.

³ *Bank of Washington v. Barrington*, 2 Penn. R. 27.

⁴ *Pendleton v. Bank of Kentucky*, 1 Monr. (Ky.) R. 175.

⁵ *McGill v. Bank of United States*, 12 Wheat. R. 511; *Paine, C. C. R.* 661.

⁶ *Pendleton v. Bank of Kentucky*, 1 Monr. (Ky.) R. 175; and see Chap. on Contracts, Post.

⁷ *State Bank v. Chetwood*, 3 Halst. (N. J.) R. 1.

In assigning a breach of such a bond it is sufficient to allege, that the principal obligor has received money for which he has not accounted.¹

6. An error against the bank, in the addition of a column of figures by the cashier, is *prima facie* evidence of a loss to the bank to the amount of such error; and the cashier and his sureties are liable therefor, unless they show that the loss did not in fact accrue.² The admissions of a cashier made while in office, that he had misapplied the funds of the bank, are, it seems, evidence of the fact against his sureties.³ As a cashier has not, *ex officio*, authority to accept a draft on a bank, unless the drawer has funds there, evidence is not admissible in a suit against a surety on his bond, that the cashier, in his individual capacity, drew a draft on the bank, and having accepted it as cashier for the bank, and sold it, that the purchaser transmitted it to him to be passed to the purchaser's credit.⁴ Where it was assigned as a breach of a cashier's bond, that the cashier had received money for which he had not accounted, evidence that he had the character of an honest, careful, and vigilant officer, and that similar losses by bank-officers are frequent, and that the directors have expressed their belief, that the loss in question was caused by accidental overpayments, and that after the loss they continued to employ him, is not sufficient to sustain a rejoinder, averring, that the loss was by accidental overpayments.⁵ Indeed, it would seem, that such a rejoinder, if duly proved, would be insufficient.⁶ In debt on a cashier's bond, which stipulated, that he should "account for all moneys received by him," the plaintiffs replied to a

¹ American Bank v. Adams, 12 Pick. (Mass.) R. 303.

² Bank of Washington v. Barrington, 2 Penn. R. 27.

³ Pendleton v. Bank of Kentucky, 1 Monr. (Ky.) R. 177.

⁴ Ibid.

⁵ American Bank v. Adams. 12 Pick. (Mass.) R. 303.

⁶ Minor v. Mechanics Bank, 1 Peters, R. 46; State Bank v. Chetwood, 3 Halst. (N. J.) R. 1; Barrington v. Bank of Washington, 14 Serg. & Rawle, (Penn.) R. 405; State Bank v. Locke, 4 Dev. (N. C.) R. 529; State Bank v. Trotter, 3 Dev. (N. C.) R. 535, 536; but see Union Bank v. Clossey, 10 Johns. (N. Y.) R. 271.

general plea of performance, that he had received divers sums of money at divers times to a certain amount, for which he had not accounted ; and the rejoinder alleged, that he had accounted for all the moneys by him received. In this state of the pleadings it was held, that the defendant was bound to show, that the cashier had accounted for the sum mentioned in the replication.¹ Where in a suit on such a bond, issue was taken on the averment, that certain false and deceptive entries were made by the clerks in the books of the bank, with the connivance of the cashier, such books, on proof, that they were kept by the clerks, and that the entries were in their hand writing, are evidence for the purpose of laying a foundation for other testimony by which to show the cashier's fraud.²

¹ *Exeter Bank v. Rogers et al.* 6 New Hamp. R. 142.

² *Union Bank v. Ridgeley*, 1 Har. & Gill, (Md.) R. 327.

CHAPTER X.

OF THE BY-LAWS OF CORPORATIONS.

§ 1. WHEN a corporation is duly erected, the law tacitly annexes to it the power of making by-laws or private statutes, for its government and support.¹ This power is included in the very act of incorporation ;² for, as is quaintly observed by Blackstone, “ as natural reason is given to the natural body for governing of it, so by-laws or statutes are a sort of political reason to govern the body politic.”³ Though the power to make by-laws is unquestionably an incident to the very existence of a corporation, it is rarely left to implication ; but is usually conferred by the express terms of the charter. And where the charter enables a company to make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified ; all others being excluded by implication.⁴

This principle is undoubtedly correct ; but the case, in reference to which it was advanced, was that of the Hudson's Bay Company, who were empowered by charter to make by-laws for the better government of the company, and for the management and direction of their business to Hudson's Bay ; “ which,” it was said, “ implied a negative that they should not make any *other* by-laws ; much less could they make by-laws in relation to projects of insurance, which by acts of parliament were declared to be illegal.”⁵ It is apprehended, however, that if this Com-

¹ *Norris v. Staps*, Hob. 211 ; *By-laws*, 3 Salk. 76 ; *City of London v. Vachner*, 1 Ld. Raymd. 496 ; *The case of Sutton's Hospital*, 10 Co. R. 31, a.

² *Norris v. Staps*, Hob. 211.

³ 1 Black. Comm. 476.

⁴ Per Ld. Macclesfield, Chan., *Child v. Hudson's Bay Co.* 2 P. Wil. 207 ; see 2 Kyd on Corp. 102.

⁵ *Child v. Hudson's Bay Co.*, 2 P. Wms. 209.

pany had not been thus *impliedly* forbidden to make by-laws on any subject, which did not relate to their trade to Hudson's Bay, unless the power of legislating on other matters had been expressly conferred upon them, their legislation would be confined to the object of their incorporation.¹ The *incidental* power of a corporation to make by-laws results from the necessity of such a power, to enable the body politic to answer the purposes for which it was created, and can be applied to nothing else ; and though the power is conferred by the express terms of the charter, yet the reasonable construction of this particular grant is, to consider it as a mean to the company for the accomplishment of the purposes of the principal grant of incorporation, and of course to be limited in its exercise to those purposes.

Unless by the charter, or some general statute to which the charter is made subject, this power is delegated to particular officers or members of the corporation, like every other incidental power, it resides in the members of the corporation at large, to be exercised by them in the same manner, in which the charter may direct them to exercise other powers or transact their general business ; and if the charter contain no such direction, to be exercised according to the rules of the common law.² The power of making by-laws is, however, frequently reposed in a select body, as the directors ; in which case a majority of that body, at least, is necessary to constitute a quorum for the purpose of passing a by-law.³ And where the general power of making by-laws is vested by charter in a select body, a by-law, made by that select body in conjunction with persons of another select description, is void. Thus, where the inhabitants of a town were incorporated by the name of the bailiffs and burgesses, and there were twelve capital burgesses, and twelve common burgesses, besides common freemen, but the power of making by-laws was vested in the bailiffs and *capital* burgesses only ; and the bailiffs

¹ *Rex v. Spencer*, 3 Burr, R. 1837 ; 2 Kyd on Corp. 102.

² *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, (Md.) R. 324.

³ *Ex parte Wilcocks*, 7 Cow. (N. Y.) R. 402.

and *all* the burgesses, including *capital* and *common* burgesses, made a by-law ; this was one reason given for holding the law void.¹ So, where by charter the power of making by-laws was *expressly* given to the mayor and aldermen of a city ; and they, *with the assent of the commonalty*, made a by-law, which altered the constitution of the corporation ; Lord Mansfield said, *the body at large* had no power to make by-laws, because that power was given by the charter to a *select* body.² This holds true, unless certain rights, as those of electing officers and members, remain in the body at large ; in which case, as incident to the right of election, they have the power of making by-laws for regulating the manner in which that right shall be exercised ;³ and especially if the power of the select body is derived from a new charter, in derogation of the ancient right of the body at large, to make by-laws in all cases.⁴ Where the power of making by-laws is confided to a select body, as mayor and aldermen, if a by-law purporting to be made by mayor, aldermen, and *burgesses*, be found by the verdict “ to be in due manner made,” it will not be assumed that the burgesses joined in making this by-law, which would avoid it ; but that the mayor and aldermen alone, acting in pursuance of their authority, made it in the name of the mayor, aldermen, and burgesses.⁵

If the charter prescribe the mode in which the by-laws shall be made and adopted, in order to their validity, that mode must be strictly pursued. Thus, where a gas light company was empowered to make by-laws *under seal* for its government, and for regulating the proceedings of the directors, officers, and servants, and at a meeting of the company a resolution was passed, *not under seal*, allowing each director for his attendance on courts,

¹ Parry v. Berry, Comyn, R. 269.

² Rex v. Head, 4 Burr. 2515, 2521 ; and see Hoblyn v. Regem, 6 Bro. P. C. 519 ; Rex v. Westwood, 4 B. & C. 799, 818 ; Bedford v. Fox, 1 Lutw. 564.

³ Ibid.

⁴ Rex v. Westwood, 4 B. & C. 800, 813 ; S. C. 7 D. & R. 273 ; 2 Dow & Clark, 21 ; 4 Bligh, N. S. 213 ; 7 Bingh. 1.

⁵ Greene v. Durham, 1 Burr. R. 131.

committees, &c., one guinea for each time of attendance, it was decided not to be a by-law within the statute.¹ But where the charter is silent upon this point, since it is now well settled, that a corporation aggregate may act without seal or writing, and is open to the same implications as an individual ; it may adopt by-laws as well by its own acts and conduct, and the acts and conduct of its officers, as by an express vote, or an adoption manifested by writing. In the case of the *Union Bank of Maryland v. Ridgely*,² where it appeared that, by charter, the President and Directors of the Bank were authorized to make all such by-laws and regulations for the government of the corporation, its officers, and members, as they or a majority of them should from time to time think fit ; upon a certain writing being given in evidence headed " By-Laws," and which purported to have been the by-laws of the bank, while its business was transacted under articles of association, and before the act of incorporating it was passed, it was objected that there was no evidence that the writing produced had been adopted as the by-laws of the corporation, there being no entry or memorandum of such adoption among the minutes of its proceedings. The Court of Appeals in Maryland, however, decided, that the authority to make by-laws being specially delegated to the president and directors, without the mode of exercising it being prescribed by the charter ; it was no more necessary that their adoption should be in writing, than the acts or contracts of any other duly authorized agents ; and it being proved by the cashier, that the by-laws in question were always reputed to be the by-laws of the corporation, and with the exception of two articles, were so observed by him ; and by a director, that they were delivered to him as such upon his election, and that decisions by the board of directors were made agreeably to them in any question upon their conduct ; this was held a sufficient adoption of the by-laws by the president and directors, and sufficient proof of the same, there being no record

¹ *Dunston v. Imperial Gas Company*, 3 B. & Adolph, 125.

² 1 *Harris & Gill*, (Md.) R. 324 ; and see *Taylor v. Griswold*, 2 *Green*, (N. J.) R. 223 ; and *Fairfield Turnpike Co. v. Thorp*, 13 *Conn. R.* 173.

or minute of the fact. In the case of the *King v. Ashwell*,¹ in a plea to an information in the nature of a *quo warranto*, it was stated among other things, that on the fifth of May, 1577, the mayor and burgesses of Nottingham duly made a certain reasonable *by-law not now extant in writing*, (and, after reciting the by-law,) to which by-law the mayor and burgesses for the time being, from the time of making thereof hitherto, have consented and conformed themselves, and the same is now in force and unrepealed. The replication took, among other issues, one "that the mayor and burgesses did not make such a by-law;" yet a verdict was found for the defendant, although the only evidence of the making and terms of the by-law must have been in the long continued and invariable usage of the corporation.

It need hardly be mentioned, that the same body in a corporation, which has a power to make, has the power to repeal by-laws; it being of the very nature of legislative power, that by timely changes in the rule it prescribes, it should be enabled to meet the exigencies of the occasion.² As a court will direct a jury to find a by-law, its terms, and adoption, from the usage and conduct of the corporation and its officers; so, from non-observance of one, will it presume a subsequent by-law to repeal and alter it. Thus, on an information before Lord Chancellor Hardwicke against the masters and governors of a school, in which the first and principal relief prayed was to remove the master, as not qualified by the statutes of the foundation; it not appearing that the statutes had been observed in any one instance, his lordship said, "that he must presume a repeal of them."³

¹ *King v. Ashwell*, 12 East, 22; and see *Rex v. Westwood*, 4 B. & C. 786; S. C. 7, D. & R. 273.

² *King v. Ashwell*, 12 East, 22; *Rex v. Westwood*, 4 B. & C. 806. In the absence of any precedent, the court refused a rule nisi for a mandamus, calling on the mayor of a town to propose a resolution to the burgesses, in guild assembled, for repealing certain by-laws, though it was alleged that by-laws and ordinances might by charter be made, and had formerly been made at such guilds. *Garrett v. Newcastle*, 3 B. & Adolph. 252.

³ *Attorney General v. Middleton*, 2 Ves. Sr. 328; see, too, *Berwick upon Tweed v. Johnson*, Loft, 338.

§ 2. Eléemosynary corporations are distinguished from others in this, that they have no incidental power of legislation. They are the mere creatures of their founder, and he alone has a right to prescribe the regulations according to which his charity shall be applied. His statutes are accordingly their laws, which they have no power to alter, modify, or amend.¹ And after a body of statutes has been given by the founder, it is held that neither he, nor his successor as visitor, can add to or alter them, without an express reservation of power to that effect.² Where the college has consented to receive a set of new statutes given by *the founder*, we see, with Mr. Kyd,³ no good reason why they should not be bound by them, even though there be no such reservation; but the practice of a college acting under a set of new statutes given by the *successor* of the founder or visitor, unless he is authorized to give them, has always been disapproved by the courts;⁴ and upon sound policy: since one of the great inducements to his donation on the part of the founder, may have been the hope that his charity would always flow in the channel, and according to the rules which he should prescribe. Where a new donation is made to, or a new fellowship ingrafted on, an existing eleemosynary corporation, it is subject to the statutes or rules of the old foundation, unless the new founder prescribe rules of his own.⁵ The power of making new statutes, and of altering and

¹ Phillips v. Bury, 1 Ld. Raym. 8, per Holt, C. J.; S. C. Comb. 265; S. C. Holt, 715; S. C. 1 Show, 360; S. C. 4 Mod. 106; S. C. Skin. 447; S. C. 2 T. R. 352; Bentley v. Bishop of Ely, Fitzgibbon, 305; S. C. Str. 912; St. Johns College, Cambridge, v. Todington, 1 Burr. R. 201; Green v. Rutherford, 1 Ves. 462; Trustees of Phillips' Academy v. King, Exr. 12 Mass. R. 546; Dartmouth College v. Woodward, 4 Wheat. R. 660.

² Bentley v. Bishop of Ely, Str. 913; Phillips v. Bury, Skin. 513; Green v. Rutherford, 1 Ves. 472, 473, 474, per Ld. Hardwicke; Attorney General v. The Earl of Clarendon, 17 Ves. 500; St. John's College, Cambridge, v. Todington, 1 Burr. R. 201, per Ld. Mansfield. See also Dartmouth College v. Woodward, 4 Wheat. 676, Opinion of Story J.; 2 Kent, Comm. 243.

³ 2 Kyd on Corp. 103.

⁴ Bentley v. Bishop of Ely, Str. 913; Green v. Rutherford, 1 Ves. 472; Phillips v. Bury, Skin. 513; St. John's College, Cambridge, v. Todington, 1 Burr. R. 201.

⁵ Case of University of Oxford, cited 1 Burr. R. 203; Attorney General

amending the old, may be, however, and frequently is, given to the governors, trustees, &c. of the corporation.¹ Where the words "*shall and may*" are used in a general act, or in the constitution of a private charity, they are to be construed imperatively, in the same manner as the word "*must*;" as, if the founder's constitution of the charity declares, that if certain officers are found guilty of immorality, drunkenness, or any debauchery, the governors and visitors "*shall and may* remove them;" an obligation to remove for these causes is imposed.²

From the total non-observance of the statutes of a private foundation, a repeal of them has been presumed.³

§ 3. The law of the country, being as well a rule for the proceedings of corporations, as for the conduct of natural persons, all by-laws of a corporation contrary to the Constitution of the United States, and the Acts of Congress in pursuance of it, to the constitution and valid statutes of the State in which it is established, and to the common law as it is accepted there, are consequently void.

1. As neither a State, nor the general government can transcend the powers conferred upon them by their constitutions, so a corporation, acting by the grant of either, must of course be bound by that supreme law which limits even the power that created it a corporation. In England, if a by-law be contrary to the general laws of the kingdom it is void, though justified by the terms of the charter; for all by-laws, says Hobart, must ever be subject to the general law of the realm, and subordinate to it; and if the King, in his letters patent of incorporation, make ordinances

v. Talbot, 1 Ves. 79; *S. C.* 3 Atk. 674; *Green v. Rutherford*, 1 Ves. 467, 468, 472; *St. John's College, Cambridge, v. Todington*, 1 Burr. R. 202, 203, 204.

¹ *Eden v. Foster*, 2 P. Wms. 325; *Green v. Rutherford*, 1 Ves. 472, per *Ld. Hardwicke*; *Attorney General v. Locke*, case of *Morden College*, 3 Atk. 164; *Attorney General v. Earl of Clarendon*, 17 Ves. 491; *Trustees of Phillips' Academy v. King*, *Exr.* 12 Mass. R. 547.

² *Attorney General v. Locke*, case of *Morden College*, 3 Atk. 166, per *Ld. Hardwicke*.

³ *Attorney General v. Middleton*, 2 Ves. 330.

himself, they are subject to the same rule of law.¹ So, neither a State, nor the general government, can grant legislative powers larger than they possess themselves ; and hence, however unlimited in this particular may be the terms of its charter, all by-laws of a corporation, contrary to the constitutional law of the land, must be void. For this reason, a by-law "impairing the obligation of contracts," or taking "private property for public use, without just compensation," is void.² But where a statute authorized the corporation of a city to make by-laws "regulating," or, if necessary, "*preventing*, the interment of the dead," within the limits of the city, it was held, that though that corporation had granted lands for the purpose of interment, and had covenanted that they should be quietly enjoyed for that purpose, yet that it was not thereby estopped from passing a by-law forbidding such interment under a penalty. This case was decided on the ground, that the legislative power of the corporation over this subject was delegated to it for the good of the city, and that the law passed was to be regarded as if passed by the legislature, that no citizen was entitled to use his property so as to injure another, and that no covenant could give him power so to do, even though made with the corporation ; since, as tending to control and embarrass the exercise of its important powers as a local legislature, the covenant, when it came in competition with them, must give way, or was repealed.³

2. Again, by-laws infringing the laws of Congress made in pursuance of the constitution,⁴ the general statutes of a State, or particular statutes relating to the corporation (provided these do not impair the obligation of the charter) are void.⁵ Where by

¹ *Norris v. Staps*, Hob. 210.

² *Stuyvesant v. Mayor, &c. of New York*, 7 Cowen, (N. Y.) R. 585.

³ *Presbyterian Church v. City of N. Y.* 5 Cowen, (N. Y.) R. 538 ; *Coates v. Mayor, &c. of N. Y.* 7 Cowen, (N. Y.) R. 604. The ordinance by which, in 1790, the corporation of Georgetown first exercised the power of graduating their streets, was not in the nature of a compact, but might be repealed by the corporation. *Gozzler v. Corporation of Georgetown*, 6 Wheat. R. 593.

⁴ *United States v. Hart*, 1 Peters, Cir. Ct. R. 390.

⁵ *Norris v. Staps*, Hob. 211 ; 5 Co. R. 63, *Clark's Case*. See By-laws, 3

statute the trustees of academies were empowered "to appoint teachers or other officers, and remove or displace them at pleasure," it was held, that by no resolution of the trustees could they abridge the power of removal, vested in them and their successors.¹

3. The legislative power of a corporation is not only restricted by the constitutional and statute law of the State in which it is established, but by the general principles and policy of the common law, as it is accepted there.² Indeed, whenever a by-law seeks to alter a well settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security, of individuals or the public, a statute or other special authority, emanating from the creating power, must be shown to legalize it, either expressly or by implication.³ Thus, a bridge corporation has not incidentally, nor by virtue of a general clause in its charter, authorizing it to make proper by-laws for its government, not repugnant to the act of incorporation or the constitution and laws of the State, power to make a by-law conferring the right of voting by proxy, or imposing, as a test or qualification for office or admission, the ownership of a certain number of shares, or giving a vote for every share of the stock, where the charter, either by express terms or reasonable implication, confers no such right.⁴ It is upon the same principle, that though many by-laws passed by the ancient municipal corporations, and trade companies in England, for the *regulation* of trade,⁵

Salk. 76; *Rex v. Barber Surgeons*, 1 Ld. Raymd. 585; *Rex v. Miller*, 6 T. R. 277; *Rex v. Haythorne*, 5 B. & C. 425.

¹ *Auburn Academy v. Strong*, 1 Hopkins, Ch. R. 278.

² *Norris v. Staps*, Hob. 210; *Lee v. Wallis*, 1 Kenyon, 292; *S. C. Sayer*, 262; *The People v. Kip et al.*, 4 Cowen, (N. Y.) R. 382, n.

³ *Taylor v. Griswold*, 2 Green, (N. J.) R. 223; *Phillips v. Wickham*, 1 Paige, (N. Y.) Ch. R. 598; but see *State v. Tudor*, 5 Day, (Conn.) R. 329.

⁴ *Taylor v. Griswold*, 2 Green, (N. J.) R. 223; 2 Kent, Comm. 294, n. b.

⁵ *Chamberlain of London's Case*, 5 Co. R. 63; *London v. Vanacre*, 12 Mod. 371; 1 Rol. R. 5; 2 Rol. Abr. 365 to 369; 3 Salk. 76; *Player v. Jenkins*, 1 Sid. 284; *Bosworth v. Hearne*, C. T. H. 408; March 15; *Butchers v. Morey*, 1 H. Bl. 370; *Pierce v. Bartrum*, Cowp. 270; *Shaw v. Pope*, 2 B. & Adolph. 465.

and the prevention of monopoly,¹ have been adjudged good; yet, many have been adjudged void, as in *restraint* of trade, and to the oppression of the subject.² These corporations being very ancient, many of their by-laws, which would otherwise be void as in restraint of trade, are supported by special customs, which suppose a former grant of a monopoly.³ Some by-laws are so oppressive, that even a special custom will not support them;⁴ and in all cases, a custom, to support a by-law in restraint of trade, must be strictly proved,⁵ without a material variance between the custom and the by-law.⁶ It seems, however, that though there be such customs as to prescriptive companies, they cannot be applied to new companies incorporated in the municipality.⁷

¹ *Freemantle v. Silkthrowsters*, 1 Lev. 229, doubted in *Willcock on Municipal Corporations*, 142; *Davenant v. Hurdia*, Moore, 591.

² *Bedford v. Fox*, 1 Lutw. 563; *Norris v. Staps*, Hutton, 5; S. C. Moore, 869; S. C. Hob. 211; Bac. Abr. 338; 3 Salk. 76; *Tailors of Ipswich*, 11 Co. R. 53; S. C. 1 Rol. R. 4, 5; *Cloth-workers of Ipswich*, Godb. 253; *Parry v. Berry*, Comyn, 269; *Chamberlain of London v. Compton*, 7 D. & R. 601; *The King v. The Coopers Co.*, 7 T. R. 543; *Clark v. Le Cren*, 9 B. & C. 52.

³ *Bosworth v. Bugden*, 7 Mod. 459; *Colchester v. Goodwin*, Carter, 117, 120; *Bricklayers and Plasterers*, Palm. 395; S. C. Hardres, 56; *Player v. Jones*, 1 Vent. 21; *Broadnax Ca.* 1 Vent. 196; *Bosworth v. Hearne*, Andr. 97; S. C. 2 Str. 1085; S. C., C. T. H. 408; *Player v. Vere*, T. Ray, 288, 328; *Bodwic v. Fennell*, 1 Wils. 233; *Tailors of Bath v. Glazby*, 2 Wils. 266; *Harrison v. Godman*, 1 Burr. R. 16; *Hesketh v. Braddock*, 3 Burr. R. 1858; *Wooly v. Idle*, 4 Burr. R. 1952; *The King v. The Coopers Co.*, 7 T. R. 543; *The King v. Tappenden*, 3 East, 186; *Chamberlain of London v. Compton*, 7 D. & R. 601; *Clark v. Denton*, 1 B. & Adolph. 92; *Clark v. Le Cren*, 9 B. & C. 52.

⁴ *Davenant v. Hardis*, Moore, 591; *Wood v. Searl*, Bridg. 141; *Davis v. Morgan*, 1 C. & J. 587; 1 Tyr. 457; 1 Price, P. C. 77.

⁵ *Hesketh v. Braddock*, 3 Burr. R. 1858.

⁶ *Colchester v. Goodwin*, Carter, 117, 120. Where the variance is immaterial, see *Hesketh v. Braddock*, 3 Burr. R. 1858; *Wooly v. Idle*, 4 Burr. R. 1952; *Tailors of Bath v. Glazby*, 2 Wils. 266; *Bosworth v. Bugden*, 7 Mod. 459; see also *Fazakerly v. Wiltshire*, 1 Str. 466, 467, that a by-law, good at common law, is not vitiated by the variance or excess of the custom.

⁷ *Chamberlain of London v. Compton*, 7 D. & R. 601; *Bolton v. Throg-*

In New York, where the trustees of a village corporation were authorized to make such prudential by-laws, rules, and regulations, as they from time to time should deem meet, relative "to huckster shops in said village," provided they were not inconsistent with the laws of the State, or the United States, it was held, that a by-law passed by the trustees, that hucksterers should take and pay for a license from the trustees under a penalty, especially where it did not expressly appear that prudence required such a by-law, was in restraint of trade and void, as contrary to the general principles and policy of the laws of the State.¹ There are, however, numerous municipal ordinances and by-laws affecting the property of the citizen, such as ordinances requiring the owners of lots fronting on certain streets to fix curb-stones, and make a brick way in front of their lots,² affecting and regulating certain occupations, and modes of using and exhibiting certain animals, such as by-laws prohibiting unlicensed persons from removing house dirt and offal from the city,³ prohibiting venders of the produce of their own farms, &c., from occupying stands for the purpose of vending, in certain streets, constituted by the by-law, a part of the market,⁴ prohibiting the driving or riding of horses on the trot or gallop, in the streets of a city,⁵ or the public exhibition of stud-horses,⁶ or, requiring coal to be weighed,⁷ which are held reasonable and valid, as no more than a proper exercise of that general legislative power usually vested in muni-

morton, Skin. 55, semb. contra; See Willcock on Municipal Corporations, 146, § 348.

¹ Dunham v. Trustees of Rochester, 5 Cowen, (N. Y.) R. 462; and see Freeholders v. Barber, 2 Halst. (N. J.) R. 64.

² Paxton v. Sweet, 1 Greenl. (Ma.) R. 196.

³ Vandine's Case, 6 Pick. (Mass.) R. 187.

⁴ Nightingale's Case, 11 Pick. (Mass.) R. 168; Buffalo v. Webster, 10 Wend. (N. Y.) R. 99; and see Bush v. Seabury, 8 Johns. (N. Y.) R. 418.

⁵ Commonwealth v. Worcester, 3 Pick. (Mass.) R. 462. In such case it is not necessary to prove that any one was endangered by the fast driving. 3 Pick. (Mass.) R. 462; 1 McCord, (S. C.) R. 333.

⁶ Nolen v Mayor, &c. Franklin, 4 Yerg. (Tenn.) R. 163.

⁷ Stokes v. New York, 14 Wend. (N. Y.) R. 87.

cialties, for the due police and government of their crowded thoroughfares.¹

A by-law by a company of Free Fishers and Dredgers, that no member should carry on a separate trade in oysters on his own account, from the same shore on which the company oyster grounds were, under a penalty, has been adjudged good, on the ground "that the company were partners; that there was nothing illegal in partners agreeing to prevent any one partner from carrying on a separate trade elsewhere, on his own account; and that there was no reason why the same thing might not be prevented by a by-law, in the case of a company like the present."² A by-law, however, made by the freemen of a company of oyster fishermen, prohibiting any freemen from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore, than the oyster ground of the company, under a penalty of 10*l*, and in case of refusal to pay the same, that such freemen shall thenceforth, and until the fine be paid, be excluded from all share of profits, to be made thereafter by the joint-trade of the company, is void; there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting freemen from being engaged on other oyster grounds, under penalties to be stopped out of the money, arising by the sale of the stint of oysters of such freemen.³

A by-law of a town, prohibiting all persons, except its own inhabitants, from taking shell-fish in a navigable river within its limits is void, as against common right;⁴ unless indeed the town

¹ A by-law of a municipal corporation, imposing penalties for particular offences, does not seem to be void merely because a general law of the State imposes penalties for the same offences. *Rogers v. Jones*, 1 Wend. (N. Y.) R. 237; 1 Bay, (S. C.) R. 382.

² Per Lord Kenyon. *The King v. The Company of Fishermen of Faversham*, 8 T. R. 352; *Adley v. Reeves*, 2 Mau. & Sel. 53; see, however, *Adley v. Whitstable Company*, 17 Ves. 323.

³ *Adley v. Reeves*, 2 M. & S. 53; S. C. called *Adley v. Whitstable Company*, 17 Ves. Jr., 304.

⁴ *Hayden v. Noyes*, 5 Conn. R. 391.

has by grant, &c. the exclusive right of fishing in the waters within its boundaries.¹

Retrospective and *ex post facto* by-laws are void at common law;² and certainly the latter are in this country, under the constitution of the United States, since no State could grant to a corporation power to do that, which it could not constitutionally do itself.

In England, a by-law made by a corporation, created by letters patent, imposing the forfeiture of goods, is void, even if the letters patent authorize such a by-law.³ In a case in the time of Elizabeth, where it appeared that King Henry VI. had, by letters patent, granted, to a corporation of dyers, power to search, &c., and if they found any cloth dyed with logwood, to seize it as forfeited, the grant of power was adjudged void, as contrary to the 29th chapter of *magna charta*; goods and chattels being by construction included in the prohibition, that "no man shall be disseised of his freehold."⁴ Neither can a corporation, created by act of parliament in that country, make and enforce such a law, unless the power so to do be expressly given by the act.⁵ Such by-laws as these, however, imposing the forfeiture of the goods of a stranger, are to be distinguished from those authorizing the corporation to seize and detain the stock of a member,⁶ for the debts, calls, or taxes which he might owe the corporation; these last being adjudged valid by consent. A by-law levying money on the subject or citizen in general is void, since by the general law, no taxes can be imposed but by act of parliament, or of the legislature.⁷ This rule does not of course interfere

¹ *Rogers v. Jones*, 1 Wend. (N. Y.) R. 237.

² 1 Keble, 733; *Howard v. Savannah*, Charl. (Ga.) R. 173.

³ Kyd on Corp. 109.

⁴ *Waltham v. Austin*, 8 Co. R. 125, a. 127, b.; 2 Inst. 47; 1 Bulstr. 11, 12; *Kirk v. Nowill*, 1 T. R. 118.

⁵ *Kirk v. Nowill*, 1 T. R. 118, per Lord Mansfield; *Player v. Archer*, 2 Sid. 121; *Clark v. Tucker*, 2 Vent. 183.

⁶ *Child v. Hudson's Bay Company*, 2 P. Wms. 207.

⁷ *Case of Quo Warranto*, Treby's Arg. 29; *Sawyer's Arg.* 42; *Player v. Vere*, T. Ray. 328.

with the right of a corporation to assess taxes upon its members for the purpose of defraying its general charges, or discharging a burthen to which it is subject,¹ or to exact a certain sum of a member upon his election to an office, on or before his admission.²

Again, by-laws prohibiting the members from pursuing their legal remedies beyond the jurisdiction of the corporation are void ; since no power, less than that of the legislature, can exclude the subject or citizen from his right to legal redress.³

It should be observed that what may be bad as a *by-law*, as against common right, may be good as a *contract* ; since a man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or perhaps knowledge, by those who might not know or would not consult his individual interests. Hence it will be found, that a by-law may be void as against strangers, or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it.⁴ An agreement, for instance, between the citizens of London, who have as extensive a power of making by-laws as any corporation, that they will not sell, except in the markets of London, would be good ; but it has been declared by the legislature in England, that a by-law to that effect is bad,⁵ being in restraint of trade. Where the members of a corporation were by statute individually liable for the payment of the debts, a by-law, allowing the stockholders, on paying thirty per cent. on their shares, to forfeit their stock, and thus avoid payment of the company debts, is void and inoperative as to creditors ; inasmuch as it is contrary to the fundamental principles of law and equity.⁶ A prior resolution of the same corpo-

¹ Jeffrey's case, 5 Co. R. 66, a. ; Clark's case, 5 Co. R. 64, a. ; Moore, 580 ; Snow v. Dillingham et al., 5 Mass. R. 547.

² T. Ray. 446 ; Vintners Co. v. Passey, 1 Burr. R. 235.

³ Player v. Archer, 2 Sid. 121 ; London v. Bernardiston, 1 Lev. 16 ; Ballard v. Bennett, 2 Burr. R. 778 ; Middleton's case, Dyer, 333, a.

⁴ Stetson v. Kempton, et al., 13 Mass. R. 282 ; Adley v. Whitstable Company, 17 Ves. 323, per Eldon.

⁵ Adley v. Whitstable Company, 17 Ves. 323, per Eldon.

⁶ Slee v. Bloom, 19 Johns. (N. Y.) R. 456.

ration, however, enacting, that every member upon paying fifty per cent on his shares should be discharged from all future calls on his subscription, except by forfeiture, was held binding on a creditor who was both a member and trustee of the corporation, and present at the passing of the resolution, and consenting to the same; the by-law being regarded in this case, as a contract between the creditor and the other members of the corporation.¹ But where a creditor, who was also a member and a trustee, at the time the resolution was passed, openly protested against it, though he afterwards accepted, in part payment of his debt, money raised under it, and was present at a subsequent meeting, when the application of the money thus raised was directed, and assented to the application; it was held, that this was no ratification by him of the by-law.² In such cases, a constructive assent to the by-law, urged from the common principle, that all the corporators are presumed to assent to what is done at a regular meeting, will not be admitted to deprive one of his right; for the presumption is, that corporations will pass none but legal votes; and to all such, and such only, the assent of those who are absent, may be presumed.³ The unanimity of the vote of those present cannot affect the rights of those absent, where the vote is itself unauthorized.⁴ And indeed, so far as a member's rights, duties, and obligations as a corporator are concerned, he is bound by the acts of the majority; but the corporation has of course no right, by by-law or resolution, without his consent, to dispense with a contract, in which he is one party, and the corporation the other.⁵

§ 4. The by-laws of a corporation must not be inconsistent with its charter; for this instrument creates it an artificial being, imparts to it its power, designates its object, and usually prescribes its mode of operation. It is, in short, the fundamental

¹ Ibid.

² Ibid.

³ See *Stetson v. Kempton et al.*, 13 Mass. R. 282, Chief Justice Parker's opinion.

⁴ Ibid.

⁵ *Revere v. Boston Copper Company*, 15 Pick. (Mass. R. 363.

law of the corporation ; and in its terms and spirit, as a constitution to the petty legislature of the body, acting by and under it. Hence all by-laws in contravention of it are void. "The true test of all by-laws," says Mr. Justice Wilmot, "is the intention of the crown in granting the charter, and the apparent good of the corporation."¹ In the same case, it is said by Mr. Justice Yates, that, "corporations cannot make by-laws contrary to their constitution. If they do, they act without authority."² With relation to the important power of electing officers by municipal corporations, this very obvious rule was, however, directly violated in the celebrated case of corporations,³ decided in the time of Elizabeth. In this case, it appears, that "*when divers attempts were made in divers corporations, contrary to the common usage, to make popular elections,*" the Lords of Elizabeth's council demanded of her chief and other justices, whether, when the charters of divers municipal corporations prescribed, that the mayors, bailiffs, aldermen, provosts, &c., shall be chosen by the *commonalty or burgesses, &c.*, elections of these officers by a *certain selected number of the principal of the commonalty or burgesses, called the common council, or the like*, according to ancient usage, were good in law ; forasmuch, as by the words of the charters, the election should be indefinitely by the commonalty or burgesses, which is as to say, by *all* the commonalty or all the burgesses, &c. The Justices, "upon great deliberation and conference had among themselves," as we are told, resolved, that such ancient and usual elections were warranted both by law and the charters of the corporations. The reason they gave was, that by their charter these corporations were empowered to make laws, ordinances, and constitutions for the better government and order of their cities and boroughs, by force of which, and "*for*

¹ Rex v. Spencer, 3 Burr, R. 1838 ; and see Rex v. Cutbush, 4 Burr, R. 2204 ; Rex v. Gravesend, 4 D. & R. 117 ; 2 B. & C. 602.

² Rex v. Spencer, 3 Burr. 1839 ; and see The King v. Ginever, 6 T. R. 735, 736 ; Hoblyn v. Regem, 2 Bro. P. C. 329. And a by-law cannot explain a doubtful charter. If there be any ambiguity on the face of the charter, it is the province of the court to expound it ; 2 Selw. N. P. 1144.

³ 4 Co. R. 77, 78.

avoiding of popular confusion," they might, by their common consent, ordain, that the officers should be chosen by a selected number of the principal of the commonalty, which by-law, "*for the avoiding of popular disorder and confusion*," they adjudged would be good. And even if the by-law could not be shown, they decided they would presume it, from ancient and continual usage, though it began within time of memory. Lord Coke closes his report of this decision, with "God forbid that they (the usages established by the decision) should be now innovated or altered; for many and great inconveniences will thereupon arise, all which the law has well prevented, as appears by this resolution."¹ Though Lord Kenyon intimated, and in one case very sarcastically,² his opinion against by-laws limiting the number of electors appointed by the charter, even when made by the whole corporation; ³ yet the case of the corporations, settled as it was upon great deliberation, has in England been generally followed; ⁴ and its principle even extended to the election of *burgesses*, as standing upon the same footing in this respect, with the higher orders of the corporation.⁵ Such a by-law, in order to restrain the right of the commonalty, must be made by "common assent,"⁶ or, in other words, by the commonalty themselves; and if made by a select body, though the power of making by-laws is reposed in them, it is void; for they do not represent the commonalty.⁷ And it seems, that though the *number* of electors

¹ The Case of Corporations, 4 Co. R. 778.

² The King v. Ginever, 6 T. R. 735.

³ Ibid. The King v. Holland, 2 East, 74.

⁴ Colchester Case, 3 Bulstr. 71; Rex v. Grosvenor, 7 Mod. 198; Rex v. Tomlyn, C. T. H. 316; Rex v. Castle, Andr. 124; Rex v. Tucker, 1 Barnard. 27; Rex v. Spencer, 3 Burr. R. 1837; Rex v. Cutbush, 4 Burr. R. 2207; Rex v. Head, 4 Burr. R. 2515; Hoblyn v. Regem, 6 Bro. P. C. 519; Newling v. Francis, 3 T. R. 189; Rex v. Ashwell, 12 East, 22; Rex v. Atwood, 7 Nev. & M. 286.

⁵ Rex v. Bird, 13 East, 384; Rex v. Westwood, 4 B. & C. 782; S. C. 7 D. & R. 269; 2 Dow and Clark, 21; 4 Bligh, N. S. 213, 7 Bingh. 1.

⁶ Case of Corporations, 4 Co. R. 77, 78.

⁷ Colchester Case, 3 Bulstr. 71; Rex v. Spencer, 3 Burr. R. 1837; Rex v. Cutbush, 4 Burr. 2204.

specified in the charter may be restrained by a by-law, yet, that a by-law cannot strike out *an integral part* of the electors ; nor narrow nor extend the number of the eligible, or those out of whom the election is to be made.¹ But though the by-law would be void, if it lessened the number of persons eligible to office, yet this feature of a by-law, presumed from ancient usage, will not be inferred from the circumstance of the election by the limited body having almost uniformly fallen upon members of the limited body.² It is evident, however, that the case of the corporations, though established as law in England, is wholly indefensible on principle. The charters prescribed, that the elections should be by the commonalty ; and we do not perceive by what right the commonalty, though unanimous, could delegate to others, or to a selected number of their own body, a right which, by the instrument that enabled them to act at all, was to be exercised by themselves. Though they had power to make laws, ordinances, and constitutions, for the better government and order of their cities, boroughs, &c. ;” as it seems to us, this power given by their charters was clearly limited by the clause, which prescribed the mode of election. Indeed, admitting even, that “ the avoiding of the disorder and confusion of popular elections,” was worth striving for ; and that the by-law supposed was ever passed, the assumption by the commonalty amounts, as Lord Kenyon remarked of a similar assumption in a case before him, to this, that “ the crown having, in the estimation of the corporation, made a defective instrument, the latter wish to cure that defect.”³ The truth is, probably, that no such by-law was ever passed by the commonalty. The Justices *presumed* the by-law from the usage ; but it is well known, that even the right of returning members to parliament was regarded in early times, rather as an inconvenience than a privilege ; and the fair presumption is, that it was

¹ *Rex v. Atwood*, 1 Nev. & M. 286 ; *Rex v. Bumstead*, 2 B. & Adol. 699 ; *Rex v. Spencer*, 3 Burr. R. 1838 ; *The Carmarthen Case*, there cited by Wilmut, J. ; see, however, *Rex v. Westwood*, 4 B. & C. 801, 820 ; S. C. 7 D. & R. 304, 305.

² *Rex v. Atwood*, 1 Nev. & M. 286 ; S. C. 4 B. & Adolph. 699.

³ *The King v. Ginever*, 6 T. R. 735.

the mere supineness of the commonalty in general, that permitted the administration of corporate affairs, and among others the election of officers, to devolve upon the select classes.¹ When we consider the arbitrary times in which this decision was made, the little attention then paid to popular rights, the well known subserviency of the courts of justice to the ruling powers, and the fact, that the resolution was made upon a reference from the Lords of the Council² to the Justices, "because divers attempts were made in divers corporations, contrary to ancient usage *to make popular elections*," we see reason enough for the decision, without recurring to the principles of the common law.³

We very much doubt whether the principle introduced into England by "the case of corporations," with regard to the old municipal corporations of that country, will be generally applied in the United States, at least to private corporations created by statute; and we have dwelt thus long upon it, because it seems to have been thought susceptible of such an application by the Supreme Court of Pennsylvania, in a case, which, as it appears to us, might well have been decided as it was, without reference to such a principle. This was the case of the *Commonwealth v. Cain et al.*,⁴ where it appeared that the charter of a church corporation authorized the minister, church-wardens, and vestry-men, to make rules, by-laws, and ordinances, and transact everything requisite for the good government and support of the church; and directed also, that the election of ministers, &c., should be conducted according to certain rules, one of which was, that no persons were to vote except those who had been regularly admitted, and members of the church twelve months previous to the election. A by-law enacting that no member whose pew-rent

¹ Hallam's Constitutional History of England, vol. iii. p. 54, 61 to 65.

² "It was perceived, however, by the assertors of the popular cause, under James I., that by this narrowing of the electoral franchise, *many boroughs were subject to the influence of the privy council*, which, by restoring the householders to their legitimate rights, would strengthen the interests of the country." Hallam's Constitutional History of England, vol. iii. p. 62, 63.

³ Willcock on Mun. Corp. 122 to 125.

⁴ 5 Serg. & Rawle, (Penn.) R. 510.

was in arrear for a longer time than two years should be entitled to vote for officers, was held valid ; inasmuch as it was reasonable, for the good government and support of the church, *and not contradictory to the charter of incorporation*. The punctual payment of pew-rent was a duty of each pew-owner, which the corporation, unless expressly or impliedly forbidden by their charter, might enforce by penalties ; and we see no reason why the penalty should not as well be the loss of a vote, as the seizure and detention of stock. The charter contemplated that each pew-owner would perform the obvious duty of supporting the church ; without which, his voting for officers would be nugatory ; and there was no occasion for a reference to those English cases which support the doctrine, that “by-laws for the good of the corporation are valid, although they reduced the number of *electors* to narrower bounds, than were marked out by the charter.”

As transcending the charter, by-laws creating a new office,¹ imposing an oath of office where none is provided by the constitution,² giving a vote to a person,³ or a casting-vote to an officer,⁴ who is not entitled to it by the charter ; restricting⁵ or extending⁶ the right of admission or eligibility to office, as given by the charter ; altering the prescribed mode of election, or imposing new or additional tests or qualifications on members or voters, are void.⁷ And where a by-law confers the right of voting by

¹ *Rex v. Ginever*, 6 T. R. 735.

² *Rex v. Dean and Chapter of Dublin*, 1 Str. 539. And in England, if an oath be appointed by the constitution, and no one provided to administer it, the corporation cannot empower an officer for that purpose ; but application must be made to chancery, and a *dedimus* obtained to confer on some person authority to administer the oath. *Ibid*.

³ *Rex v. Bird*, 13 East, 384.

⁴ *Rex v. Ginever*, 6 T. R. 736.

⁵ *Rex v. Coopers of Newcastle*, 7 T. R. 548 ; *Rex v. Cambridge*, 2 Selw. N. P. 1144 ; *Rex v. Tappenden*, 3 East, 191 ; *Lee v. Wallis*, 1 Kenyon's Ca. 292 ; *S. C. Sayer*, 263 ; *Rex v. Atwood*, 1 Nev. & M. 286.

⁶ *Powell v. Regem*, 3 Bro. P. C. 436 ; *Rex v. Weymouth*, 7 Mod. 374 ; *S. C.* 4 Bro. P. C. 464 ; *Rex v. Bumstead*, 2 B. & Adolph. 699.

⁷ *Rex v. Spencer*, 3 Burr. R. 1833 ; *Rex v. Tappenden*, 3 East, 191 ; *Tay-*

proxy,¹ or imposes the ownership of a certain number of shares as a qualification for office, or admission,² there being nothing in the charter expressed or implied, specially authorizing such by-law, or where in case of a "Savings Institution" a by-law was passed, prescribing that persons owning one share of the capital, required to be invested for the purpose of security to the depositors, should be members, and should cease to be members upon its transfer, the by-law is held void, as invading the spirit and meaning of the charter.³

So where the act incorporating an insurance company gave a vote for each share of stock, but provided that no share should entitle the holder to a vote, unless the stock should have been held by him at least sixty days next, and immediately preceding an election, and provided that the major part of the directors should constitute a board, with power to pass such by-laws as to them should appear needful and proper respecting elections, and they passed a by-law requiring a transfer of stock to be registered in order to be effectual, it was held, that a by-law requiring the inspectors of elections, whenever they should or might suspect that stock voted on had been sold or bargained for, within the sixty days, but not transferred on the books, to oblige the person proposing to vote on such stock, to adduce satisfactory proof either by his own oath or affirmation or otherwise, that the stock had not been sold, or the beneficial interest parted with by any bargain or contract within the sixty days, and in default of such proof to reject the vote, was void; and that the vendor might vote, notwithstanding the transfer within sixty days, *the same being unregistered*;—the inspectors having no right to require other tests of a voter, than that provided in the act of incorporation, — and it not being competent to the directors to pass any

lor v. Griswold, 2 Green, (N. J.) R. 223; Rex v. Bumstead, 2 B. & Adolph. 699, per Parke, J.; The People v. Tibbetts, 4 Cowen, (N. Y.) R. 358.

¹ Taylor v. Griswold, 2 Green, (N. J.) R. 223; Phillips v. Wickham, 1 Paige, (N. Y.) Ch. R. 598; but see State v. Tudor, 5 Day, (Conn.) R. 329.

² Taylor v. Griswold, 2 Green, (N. J.) R. 223.

³ Commonwealth v. Gill, 3 Whart. (Penn.) R. 228; Philadelphia Savings Institution Case, 1 Whart. (Penn.) R. 461.

by-law at variance with the provisions of the same.¹ An act incorporating a church provided, that the vestry should be elected "in the manner accustomed," which was, at a certain time and place, by the inhabitants of the parish being of the religion of the Church of England, and possessing certain other enumerated qualifications. It was held that a by-law made by the vestry, enacting that no person should be admitted a member of the church, or be entitled to the privilege of a vote in the election of the vestry, unless he should pay the sum of fifty dollars, a qualification not named in the charter, was void; inasmuch as "it required a new qualification to entitle persons otherwise qualified to vote, was therefore an attempt to transcend the powers given, and to alter the qualifications of the voters, and was a violation of the charter."² And generally, where the charter vests the admission of members in the body at large, a power vested in the directors to provide for the admission of members gives them only a right to prescribe, in their by-laws, the *time*, *place*, and *manner* of holding the election of members, and not the right to pass a by-law imposing a test of membership, not contemplated by the charter, as the ownership of a share in the capital stock of a "Savings Institution."³

A corporation may, however, *renounce* by a by-law a privilege conferred by charter, or statute; and from a constant omission to enforce a privilege against common right, where the privilege has been continually violated, such a renunciation has been presumed.⁴

§ 5. 1. The power of making by-laws, to be binding upon all the members of a corporation, whether it reside in the majority of the body at large, or of those present at a corporate meeting,

¹ *The People v. Tibbets*, 4 Cowen, (N. Y.) R. 358; *S. P. The People v. Kip et al.*, 4 Cowen, (N. Y.) R. 382, n.

² *Per Dessausure, Chan. The Vestry of St. Luke's Church v. Matthews*, 4 Dess. (S. C.) Ch. R. 578; see *Rex v. Breton*, 4 Burr. (S. C.) Ch. R. 2260.

³ *Commonwealth v. Gill*, 3 Whart. (Penn.) R. 228.

⁴ *Colchester v. Goodwin*, Carter, 118; *Berwick upon Tweed v. Johnson*, Lofft, 338; and see *Canal Company v. Sansom*, 1 Binn. (Penn.) R. 70.

or be confided by charter to a select class, is in trust for the benefit of the whole ; and must therefore be exercised with discretion. Hence, by-laws must be reasonable ; and all which are nugatory, and vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void. Thus, a by-law, or rule, of a bank, that all payments made and received must be examined at the time, does not prevent a party dealing with the bank from showing afterwards, that there was a mistake in the accounts of deposits and receipts.¹

A by-law, compelling the stewards of a corporation under a penalty to make a dinner for the master, wardens, and assistants, was adjudged void ; since it was unreasonable to compel a man to make a dinner for the luxury of others merely, without benefit to himself or the corporation.² It was said, however, by the judges, that if the by-law had been to make a dinner, to the end that the *company* might assemble and choose officers, or do anything for the benefit of the corporation, *it had been well enough* ;³ and in case of old corporations by prescription, an ancient custom, or by-law, compelling the stewards of the corporation to give a customary feast, has been held good.⁴ And, though the by-law, after enacting that the stewards shall provide the dinner at their own proper costs and charges, contain the clause, “ with such allowance out of the stock of said company, or otherwise, as the master, wardens, and assistants of said company for the time being, or the major part of them, should think fit and convenient to be allowed in that behalf ; ” it nevertheless is bad.⁵

2. A by-law by a college of physicians, that no person should be admitted into the class of candidates, before admission into the

¹ *Farmers and Mechanics Bank v. Smith*, 19 Johns. (N. Y.) R. 115 ; and see *Gallatin v. Bradford*, 1 Bibb. (Ky.) R. 209.

² *Master and Company of the Framework Knitters v. Green*, 1 Ld. Raymd. 113 ; *Carter v. Sanderson*, 5 Bingham, R. 79 ; S. C. 15 Serg. & Lowb. 371 ; 2 M. & P. 164.

³ *Ibid.* *Carter v. Sanderson*, 5 Bingham, R. 79 ; S. C. 15 Serg. & Lowb. 371 ; 2 M. & P. 164.

⁴ *Ibid.* Lutw. 1324 ; *Wallis's Case*, Cro. Jac. 555.

⁵ *Carter v. Sanderson*, 5 Bingham, R. 79 ; S. C. 15 Serg. & Lowb. 371, per Best, C. J. ; *Burrough & Gaselee*, Jura. dub.

college, unless he had taken a degree of M. D. at Oxford, Cambridge, or Dublin, except in certain specified cases, was considered reasonable; as "tending to ensure a proper education, and competence in learning."¹ A similar by-law, by a company of surgeons, as, that no member should take an apprentice who did not understand the Latin language, his ability therein to be tried in a specified manner;² or by a company of tradesmen, as masons, carpenters, &c., that no one should be free of their company, until examined and found qualified according to the directions of the by-law, has been adjudged good.³ And where a legal by-law is made for regulating admissions, it may impose a penalty on any corporate officer, who has power to admit, for making admissions contrary to such by-law.⁴

3. Where the mode of electing to corporate offices is not prescribed by charter, or immemorial usage, it may be wholly ordained by by-laws.⁵ A by-law creating inspectors of votes at elections, and vesting the appointment of them in the President of the corporation, was held to be good, as tending to prevent disorder on the day of election; although it was contended, that the right of electing the vestry-men and church-wardens belonging by charter to the congregation, the appointment of inspectors, as an incident to that right, must be exercised also by them.⁶ There would seem to be much force in this objection;⁷ but the other resolution in the same case is less doubtful. It having been found that at elections of officers, tickets were inscribed with wit-ticisms, the names of lewd women, &c.; a by-law prohibiting the counting of tickets, which had on them other things besides the

¹ *Rex v. The College of Physicians*, 7 T. R. 262; Willcock on Municipal Corporations, 135.

² *Rex v. Masters, &c. of Surgeon's Company*, 2 Burr. R. 692.

³ *Lofft*, 556; *Green's case*, 1 Burr. R. 127; and see *Rex v. Marshall*, 2 T. R. 2.

⁴ *Green's case*, 1 Burr. R. 131.

⁵ *Newling v. Francis*, 3 T. R. 189; *Rex v. Passmore*, 3 T. R. 199.

⁶ *The Commonwealth v. Woelper et al.*, 3 Serg. & Rawle. (Penn.) R. 29.

⁷ *Rex v. Westwood*, 4 Barn. & Cres. 786; S. C. 7 D. & R. 273, per Littledale and Holroyd, Justices.

names of the voters, was held reasonable, and an eagle printed on the tickets, as a party badge, was adjudged a violation of this by-law; since it deprived a voter of that secrecy to which he was entitled in the exercise of his franchise, so as to avoid the odium and violence of party prejudice.¹ A by-law, disfranchising a member for vilifying another member of the corporation, has been held void, as unnecessary to the good government of the corporation.² A by-law, however, giving power of amotion for just cause, is a good by-law, though the corporation that made it had no power of amotion, expressly given by charter, or claimed by prescription.³

4. A corporation has a right to the service of all its members, and may make by-laws to enforce it. It may thus impose a penalty on members eligible ⁴ to an office, who refuse to accept it; ⁵ or who refuse to take the oath appointed by law, as a necessary qualification for holding it; ⁶ and on members who refuse to

¹ *Commonwealth v. Woelper et al.*, 3 Serg. & Rawle, (Penn.) R. 29.

² *The Commonwealth v. St. Patrick Benevolent Society*, 2 Binney, (Penn.) R. 441. The charter of a private corporation provided, that if any member should break the rules of the society, he should be served with a notice to attend at the next stated meeting, after which a decision should be made by ballot, and if two thirds considered him guilty, he should be dealt with according to the by-laws. The by-laws provided, that no member should be entitled to receive any benefit from the society, which was a friendly, or relief society, whose complaints were the result of intoxication. A member, having been expelled by the requisite majority after due notice, brought his action to recover the allowance of a disabled member; and it was held, that the regularity of the proceeding could not be inquired into in that way, but the remedy must be by mandamus. *Black & White Smiths Society v. Vandyke*, 2 Whart. (Penn.) R. 312.

³ *Rex v. Richardson*, 1 Burr. 519; 2 Ld. Ken. 85.

⁴ *Rex v. Weymouth*, 7 Mod. 374; S. C. 4 Bro. P. C. 464.

⁵ *Ibid.*; *Barber Surgeons v. Pelson*, 2 Lev. 252; *Rex v. Grosvenor*, 1 Wils. 18; *Bodwic v. Fennell*, 1 Wils. 233; *London v. Vanacre*, 1 Ld. Ray. 496; *Vintners v. Passey*, 1 Burr. R. 239; S. C. Kenyon's Ca. 500; *Rex v. Bower*, 1 B. & C. 587; S. C. 2 D. & R. 843; *Graves v. Colby*, 1 Perr. & Dav. (Q. B.) 235; *Tobacco Pipe Makers v. Woodroffe*, 7 B. & C. 838; 5 D. & R. 530.

⁶ 2 Show. 159.

attend the corporate meetings.¹ Nor, it would seem, is a by-law of this nature less valid, though it requires that the person accepting the office shall pay a fee on his admission; and the court will not scrutinize the reasonableness of the fee, since the members of the corporation have assented to the amount; which raises a presumption that under their peculiar circumstances it is reasonable, or at least, that they deem it so.² And where a municipal corporation passed a by-law, imposing a penalty on a member who should refuse the office of sheriff, an office requiring a substantial man on account of its dignity and expense, "unless the person elected shall swear he is not worth £10,000, and bring six compurgators, approved by the court of the corporation, to swear that they believe the truth of his assertion;" the by-law was held reasonable and good. It did not impose an oath, but allowed a favor to the person liable, by permitting him to exonerate himself by a form more indulgent than that prescribed by the old common law, in an action of debt; where, in order to relieve himself from the claim, the defendant was not only required to swear that it was not owing, but to produce *twelve* compurgators, to affirm on oath their confidence in his veracity.³ In *Carter v. Sanderson*,⁴ however, Mr. Chief Justice Best was of opinion, that a by-law imposing a penalty on the steward of a company, who did not provide a dinner on Lord Mayor's day, unless he excused himself by swearing he was not worth £300, was void, as tending to the multiplication of unnecessary oaths; and the learned judge distinguished the case before him from that just alluded to, inasmuch as there the oath excusing the sheriff was necessary to the purposes of justice. It is not necessary to the validity of a by-law enforce-

¹ *Tobacco Pipe Makers v. Woodroffe*, 7 B. & C. 838; 5 D. & R. 530.

² *Barber Surgeons v. Pelson*, 2 Lev. 252; *Taverner's case*, Ray. 446; *Stationers v. Salisbury*, Comb. 221, 222; *Vintners v. Passey*, 1 Kenyon's Ca. 500; S. C. 1 Burr. R. 339.

³ *London v. Vanacre*, 1 Ld. Ray. 497; S. C. 5 Mod. 442; S. C. 12 Mod. 272; S. C. 1 Salk. 142; S. C. Carth. 482.

⁴ 5 Bingham, R. 79; S. C. 15 Serg. & Lowb. 376, per Best, C. J., Burrough, J. dubitante.

ing by a penalty the acceptance of an office, that it provide for notice to the corporator of his election ; since he is presumed to be always present at the corporate meetings, and acquainted with its proceedings, according to his duty.¹ It is held, however, that even an old English municipal corporation cannot enforce the acceptance of an office by the imprisonment of the person elected, unless there be a special custom to that effect.² And a company of London cannot imprison a member for refusing the livery, though it may impose a penalty.³ A by-law, however, imposing a penalty "on *any person* who shall refuse to undertake an office within the corporation," has been adjudged void ; for it includes strangers, who are not within the corporate jurisdiction.⁴ Although by-laws, imposing a penalty for the refusal of an office, usually contain a provision that the party elected shall be liable, only, if he be "without reasonable excuse," yet this is unnecessary ; for, in an action to recover the penalty, the defendant may show any reasonable excuse, although there is no such provision.⁵ The laying down of an office, without permission from the corporation, or the discontinuance of official service, may as well be punished by a by-law, as the first refusal.⁶ A by-law, requiring every other officer of a bank to perform such duties as may be required of them by the President and Cashier, was held to be authorized by a general power to make by-laws, and to be reasonable.⁷ A corporation may also, for their own security, make a by-law requiring their clerk to be sworn ; but cannot avail themselves of his omission to take the oath for the purpose of setting

¹ *London v. Vanacre*, 12 Mod. 273 ; S. C. 1 Ld. Ray. 499.

² *Grafton's case*, 1 Mod. 10 ; *Willcock on Mun. Corpor.* 132, § 305 ; *Rex v. Grosvenor*, 1 Wila. 18.

³ *Grafton's case*, 1 Mod. 10 ; *Poulterers Company v. Phillips*, 7 Bingh. (N. S.) C. P. 314 ; *Tobacco Pipe Makers Company v. Woodroffe*, 7 B. & C. 738.

⁴ *Mayor of Oxford v. Wildgoose*, 3 Lev. 293.

⁵ *Stationers v. Salisbury*, Comb. 222 ; *London v. Vanacre*, 1 Ld. Ray. 500 ; S. C. 5 Mod. 442 ; S. C. 12 Mod. 273.

⁶ *Cambridge v. Herring*, 1 Lutw. 405.

⁷ *Planters Bank v. Lamkin R. M. Charlton*, (Ga.) R. 34.

aside the title of a *bona fide* purchaser, on the ground that his deed had not been recorded by their duly qualified clerk.¹

5. A very important subject, upon which companies incorporated for the purpose of profit are accustomed to legislate, is the transfer of their stock ; and very interesting questions have arisen with regard to the effect of their by-laws regulating such transfers. The charter and by-laws frequently provide, that the stock of the company shall be transferable on the books of the company only, or, that to be valid and effectual, the transfer must be registered by the clerk or treasurer of the corporation on the company books, and where the charter required the transfer to *be made* on the books, the requisition was considered satisfied by a by-law, requiring the transfer *to be registered* on the books of the company.² A very literal construction has been given, in Connecticut, to such clauses, either in the charter or by-laws of a corporation ; the scope and object of such provisions being, in the view of the Supreme Court of that State, “to render the purchase of the stock secure to any person, if at the *moment* of his purchase the company books did not furnish evidence that it had been previously transferred.”³ The settled law of Connecticut is, that where such clauses are found in the charter and by-laws,⁴ or either,⁵ the transfer is invalid and of no effect for any purpose, unless made or registered on the books of the company. The registry is there deemed the originating act in the change of title ; and an entry by the clerk on the deed, “received for record,” is not considered equivalent to a registry.⁶

A more liberal construction, and one far more in accordance with their spirit and meaning, has been given to such clauses in charters and by-laws of corporations, by the courts of other

¹ *Hastings v. Bluehill Turnpike*, 9 Pick. (Mass.) R. 80.

² *Northrop v. Newtown*, 3 Conn. R. 544, *Hosmer, C. J.*

³ *Marlborough Manufacturing Co. v. Smith*, 2 Conn. R. 544 ; *Same v. Same*, 5 Conn. R. 246 ; *Northrop v. Newtown*, 3 Conn. R. 544 ; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. R. 552.

⁴ *Ibid.*

⁵ *Oxford, &c. v. Bunnel*, 6 Conn. R. 552.

⁶ *Northrop v. Newtown*, 3 Conn. R. 544.

States, and by the Supreme Court of the United States. As they are intended merely for the protection of the interests of the corporation, no effect is given to them farther than is necessary to effect that purpose. It is necessary that an incorporated company should have the means of knowing who are stockholders and members, in order that they may know to whom dividends are to be paid, and who are entitled to vote upon the stock, and where the company has a lien upon the stock for debts due to it from a stockholder, that it should have the means of preventing a transfer in derogation of its own rights. To secure this knowledge, and to enable corporations to avail themselves of their lien upon the stock of the company, without danger to the rights of purchasers, these clauses are usually inserted in their charters, or form a part of their by-laws. Accordingly where transfers of stock are made without conforming to the requisitions of the charter or by-laws, in making them, or having them registered on the books of the company, the better opinion decidedly is, that the transfer passes to the purchaser all the right that the seller had; that such provisions were not intended to, and do not incapacitate the owner of the stock from transferring it at his pleasure, or compel him to own it, unless the corporation allow him to sell against his will, and the only effect allowed to them seems to be, that the purchaser cannot claim a certificate of, or a dividend upon the shares, unless he first applies for a transfer according to the charter and by-laws. Any other proper transfer is equally valid as between vendor and vendee, and even as against a creditor of the vendor, who attached the shares before he or the corporation, through its officers, had notice of the transfer. In other words, such provisions, whether by charter or by-law, apply solely to the relation between the corporation and its stockholders; to the questions, who shall vote, to whom dividends shall be paid; and enable the corporation to protect any lien it may have upon the stock, as between itself and a stockholder indebted to it.¹ With this construction of the effect of such a by-

¹ Union Bank v. Laird, 2 Wheat. R. 390; Bank of Utica v. Smalley, 2 Cowen, (N. Y.) R. 770; Gilbert v. Manchester Iron Manufacturing Co., 11

law, there seems to be no good reason why a corporation has not an incidental power to pass it, as a reasonable and proper exercise of its legislative power, although the charter does not specially speak upon the subject. Interpreted, however, as they are in Connecticut, such by-laws might reasonably be regarded, unless expressly sanctioned by charter, as an infringement of the general law respecting the transfer of personal property, and on that account void.¹ It seems, however, that such is not the opinion of the courts in that State, as the same rigid effect is there given to a by-law of this sort, whether expressly authorized by charter, or only passed under a general authority to pass "such by-laws as should appear necessary or expedient for the government of the corporation, or the regulation of its concerns, not contrary to law."²

6. Another and very important species of by-laws to moneyed and trading corporations, and to which those which we have just been considering are to some degree only ancillary, are by-laws securing to the corporation a lien upon the shares of a stockholder for debts due from him to the corporation. Such a lien does not, it is clear, exist at common law in favor of an incorporated company. It is, however, usually given by statute, or act of incorporation to incorporated banking companies;³ and where the clause of the statute or act of incorporation provides, "that no stockholder, *indebted* to a bank, shall be authorized to make a transfer, or receive a dividend, until such debt shall have been discharged," it includes notes discounted by the bank for the stockholder, as well as debts due for an original subscription,⁴ and

Wend. (N. Y.) R. 627; *Sargent v. Essex M. Railway Co.*, 9 Pick. (Mass.) R. 202; *Sargent v. Franklin Insurance Co.*, 8 Pick. (Mass.) R. 90; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) R. 324; *Quiner v. Marblehead Social Insurance Co.*, 10 Mass. R. 476.

¹ *Sargent v. Franklin Insurance Co.*, 8 Pick. (Mass.) R. 90, Putnam, J.

² *Oxford Turnpike Co. v. Bunnell*, 6 Conn. R. 552.

³ *Union Bank v. Laird*, 2 Wheat. R. 390; *Utica Bank v. Smalley*, 2 Cowen, (N. Y.) R. 770; *Rogers v. Huntingdon Bank*, 12 Serg. & Rawle, (Penn.) R. 77; *Grant v. Mechanics Bank*, 15 Ibid., 140; *S. P. Sewall v. Lancaster Bank*, 17 Ibid., 285; *Downer v. Bank of Zanesville*, Wright, (Ohio) R. 477.

⁴ *Rogers v. Huntingdon Bank*, 12 Serg. & Rawle, (Penn.) R. 77.

that too whether such notes have come to maturity at the time the transfer is applied for, or not,¹ and whether the stockholder is liable on the same as principal or indorser.² It has been held, too, that a stockholder, who borrows money of a bank, with full knowledge of an usage not to permit a transfer of his stock, while he is indebted to the bank, is bound by such usage, and that neither he nor his assignee, under a voluntary general assignment, can maintain an action against the bank for refusing to permit his stock to be transferred.³ It has been decided also, that a by-law of a bank, giving to the institution a lien upon the shares of a stockholder for debts due from him to the bank, is a reasonable and valid by-law, and that under it, a bank may defend against a suit brought by a stockholder for a refusal to permit him to transfer his stock on its books, without first paying the debts he owed to it.⁴ Whether, however, a by-law of a corporation, merely as such, can create a general lien on the shares of a stockholder to the amount of the debts due from him to the bank, so as to affect the rights of creditors, or of a special assignee for value, without notice of the restriction, has been considered questionable.⁵ An early case, in the law of incorporated trading companies, bears somewhat upon this question.

The Hudson's Bay Company, being empowered by charter to make by-laws for the better government of the company, and for the management and direction of their trade to Hudson's Bay, made a by-law, that if any of their members should be indebted to the company, his company stock should in the first place be liable for the payment of such debts as he might owe the company, who might seize and detain the stock for the same. This by-law, *in a*

¹ Grant v. Mechanics Bank, 15 Serg. & Rawle, (Penn.) R. 140; Sewall v. Lancaster Bank, 17 Ibid, 285; Downer v. Bank of Zanesville, Wright, (Ohio) R. 477.

² McDowell v. Bank of Wilmington, 1 Harrington, (Del.) R. 27.

³ Morgan v. Bank of North America, 8 Serg. & Rawle, (Penn.) R. 73.

⁴ McDowell v. Bank of Wilmington, 1 Harrington, (Del.) R. 27.

⁵ McDowell v. Bank of Wilmington, 1 Harrington, (Del.) R. 27; Morgan v. Bank of North America, 8 Serg. & Rawle, (Penn.) R. 73; Nesmith v. Bank of Washington, 6 Pick. (Mass.) R. 329; Plymouth Bank v. Bank of Norfolk, 10 Pick. (Mass.) R. 454.

contest between the assignees in bankruptcy of the shareholder and the company, was adjudged good, upon the ground, that the legal interest in all the stock was in the company, who were trustees for the several members, and might order that the dividends to be made should be under certain restrictions, or terms; and that upon the same reason that this by-law was objected to, the common by-laws of companies, to deduct the calls out of the stock of the members refusing to pay them, might be said to be void.¹ That part of the by-law, which empowered the company to seize and detain the stock, was held also good; though it was said that there ought to be some act of the company, to order or declare that the stock of such member is seized for the debt due to them.² The whole by-law being, however, to the prejudice of other creditors, it was said, must be construed strictly, "and not extended to such debts as the members do not owe *in law*, but only in equity;" so that under it, the stock of a member was not held liable for a debt due by him to one as *trustee* for the company.³ It is very clear that a corporation has no power to make a by-law, imposing upon a stockholder a *forfeiture* of his shares for non-payment of instalments due thereon, unless the power to make such a by-law is expressly conferred upon it by statute, or act of incorporation,⁴ as it sometimes is.⁵

§ 6. Whether a by-law is reasonable or not, is a question for the court solely; and evidence to the jury on the subject, showing the effects of the law, was held inadmissible.⁶ To set aside a by-law, however, for unreasonableness, there should be no equipoise of opinion upon the matter, but its unreasonableness should

¹ Child v. Hudson's Bay Company, 2 P. Wms. 207; and see *Utica Bank v. Smalley*, 2 Cowen, (N. Y.) R. 770.

² *Ibid.*

³ *Ibid.*

⁴ In the matter of the Long Island Rail Road Co., 19 Wend. (N. Y.) R. 37.

⁵ *Herkimer Manufacturing and Hydraulic Co. v. Small*, 21 Wend. (N. Y.) R. 273; *Troy Turnpike and Rail Road Co. v. McChesney*, *Ibid.* 296.

⁶ *Commonwealth v. Worcester*, 3 Pick. (Mass.) R. 462.

be demonstrably shown.¹ Courts, in construing by-laws will interpret them *reasonably*; not scrutinizing their terms for the purpose of making them void, nor holding them invalid, if every particular reason for them does not appear.² Thus, a by-law of a Poulterers Company, enabling the master, &c., to call and admit into livery all such freemen as they should think meet, and imposing a fine upon such persons called, who should refuse to be of the same livery, without cause, was reasonably construed to imply, that the freemen called to livery must be such only as were eligible by law.³ Where a charter or statute empowers a corporation to pass such by-laws as are *necessary*, the by-law, to be valid, need not recite that it was necessary; but the "*necessity*" will be implied from the act of passing it, being in fact synonymous with "*expediency*."⁴ Where a by-law merely *empowers* a select body to do a particular act, it is to be construed as a *license*, not as a *command* to them; nor does it communicate to those, for whose benefit the power might be exercised, a right to compel the exercise of it in their favor; as, if the by-law declares that it "shall be lawful" for the select body to admit certain classes of persons, members, at appointed times.⁵ And where the statutes of the founders of a divinity school authorized the trustees to remove a professor for "gross neglect of duty, scandalous immorality, mental incapacity, or any other just and sufficient cause;" they cannot remove a professor upon grounds of mere expediency and convenience, nor unless he has forfeited his office for some of the causes mentioned in the statutes.⁶ In such case a charge

¹ Paxson v. Sweet, 1 Green, (N. J.) R. 196.

² Vinters v. Passey, 1 Burr. R. 235, 239, Dennison, J.; Workingham v. Johnson, C. T. H. 285; Colchester v. Goodwin, Carter, 119, 120.

³ Poulterers Company v. Phillips, 7 Bingh. (N. S.) C. P. 314; Tobacco Pipe Makers Company v. Woodroffe, 7 B. & C. 738.

⁴ Stuyvesant v. Mayor, &c. of New York, 7 Cowen, (N. Y.) R. 606. Whether a by-law requiring all meetings to be notified by the clerk in a particular manner, in a clause relating to special meetings, relates to annual or stated meetings, and whether a failure to comply with the formal part of the notice renders the business transacted at the meeting void, see Warner v. Mower et al., 11 Vermont R. 385.

⁵ Rex v. Eye, 4 B. & A. 272; S. C. 2 D. & R. 174; 1 B. & C. 85.

⁶ Murdoch v. Phillips Academy, 12 Pick. (Mass.) R. 244.

against him of jealousy of the other members of the faculty, of want of confidence in his colleagues and in the trustees, unaccompanied with an allegation of actually existing mischief caused thereby, is not sufficient ground for removal.¹ Nor is a charge, that there is a settled difference of opinion between a professor and the trustees, respecting the arrangement of his department, in such case, of itself a sufficient cause for removal; nor that he has unfavorably represented to another professor the character of a third; nor that he has disclosed the proceedings and differences of the faculty in their official meetings; nor that he has conversed freely with the students, as to the character and conduct of other professors, and expressed to them his opinion, that certain laws of the institution were unreasonable and unjust; nor that he has discussed with the students subjects belonging to the departments of his colleagues, impugning their arguments.²

The words "*shall and may*," when used together, are, however, as we have seen, construed to mean "*must*," whether employed in an act of parliament or public statute, or in the statute of a private foundation.³ And if a select body be empowered by a by-law to examine and approve candidates for admission, their examination and approval does not confer a right to be admitted, but the company is as free to refuse admission as before examination.⁴ If a by-law be entire, so that the part which is void influences the whole, the entire by-law is void; as if in its terms it embraces strangers, not subject to the legislative power of the corporation, as well as members.⁵ For the same reason, if the by-law empower the levy of the penalty to be by distress and sale, where there is a custom to warrant the distress, but not the sale, it is void in toto, for the distress as well as the sale.⁶

¹ Murdoch's Appeal, 7 Pick. (Mass.) R. 303.

² Ibid.

³ Attorney General v. Lock, case of Morden College, 3 Atk. R. 166; but see Rex v. Flockwood Inclosure, 2 Chit. 251.

⁴ Rex v. Askew, 4 Burr. R. 2190.

⁵ Dodwell v. Oxford, 2 Vent. 34; Guildford v. Clarke, 2 Vent. 248; Oxford v. Wildgoose, 2 Lev. 293.

⁶ Clarke v. Tucker, 3 Lev. 282; Lee v. Wallis, 1 Kenyon's Ca. 295; and

On the other hand, if the by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as if the void clauses had been omitted ; for where it consists of several particulars, it is to all purposes as several by-laws, though the provisions are thrown together under the form of one.¹

§ 7. Though a corporate company may, by prescription or statute, be vested with a local jurisdiction, so that its by-laws will bind those within its jurisdiction, whether strangers or members of the corporation ;² yet unless this be the case, a corporation has jurisdiction over its own internal concerns only, and its by-laws are binding upon none but its members.³ These the by-laws obligate upon the ground of their express or implied consent to them ;⁴ nor is it an objection to a corporator's being bound by

see *Rex v. Feversham*, 8 T. R. 356; *Player v. Vere*, T. Ray. 328; *Rex v. Spencer*, 3 Burr. R. 1839.

¹ *Fazakerly v. Wiltshire*, 1 Str. 469, per Pratt, C. J. ; S. C. 11 Mod. 353; *Harris v. Wakeman*, Sayer, 256; *Lee v. Wallis*, 1 Kenyon's Ca. 295; *Rex v. The Coopers Co.* 7 T. R. 549, per Lawrence, J. ; *Rex v. Feversham*, 8 T. R. 356; *Rogers v. Jones*, 1 Wendell, (N. Y.) R. 237.

² *Kirk v. Nowill and Butler*, 1 T. R. 118; *Rex v. College of Physicians*, 4 Burr. R. 2186; 5 Burr. R. 2740; *Vandine's case*, 6 Pick. (Mass.) R. 187. In Massachusetts, a statute of that State, which forbids innkeepers, &c. to give credit to any undergraduate of a college, without consent of the president thereof, or of such other officer as may be authorized by the government of the college, *or in violation of any rules and regulations of the College*, has been held to be constitutional. But no penalty is incurred by an innkeeper, &c., under this statute, unless some rules have been made by the college on the subject of giving credit, nor unless some officer has been authorized to give or withhold his consent : and in an action for the penalty imposed by the statute, the declaration is fatally defective, if it do not allege that rules have been established, and an officer, authorized, &c. *Soper v. Harvard College*, 1 Pick. (Mass.) R. 177.

³ *Butcher's Company of London*, 1 Bulstr. 11, 12; Com. Dig. By-law, C. 2; *Dodwell v. University of Oxford*, 2 Vent. 33, 34; 2 Jones, 145; *The Company of Horners v. Barlow*, 3 Mod. 159; see 1 Rol. Abr. 366; *Carth.* 179; 1 Salk. 193; *Mayor of Oxford v. Wildgoose*, 3 Lev. 293; *Mechanics Bank v. Smith*, 19 Johns. (N. Y.) R. 115.

⁴ *Jones*, 145; *Adley v. Reeves*, 2 M. & S. 60; *Stetson v. Kempton et al.*

a by-law, that he had no notice of it, or that he was not a member of the corporation at the time the by-law was passed.¹

§ 8. The power to make by-laws, necessarily supposes the power to enforce them by pecuniary penalties, competent and proportionable to the offence;² and a penalty incurred may be enforced, after the expiration of the period it was intended to regulate.³ It is impossible to lay down any rule as to what is a reasonable penalty; but this must be determined by the nature of the offence.⁴ The penalty must be a sum certain, and not left to the arbitrary assessment of the governing part of the company upon the circumstances of the particular case, even though the utmost limit of the sum be fixed; for this would be allowing a party to assess his own damages.⁵ And where the amount of the penalty to be inflicted by a corporation on the breach of one of its by-laws is expressly or impliedly fixed by the charter, a by-law, the penalty of which exceeds that amount, is void; as a by-law of a city corporation, inflicting a penalty beyond what can be recovered in its court of Wardens.⁶ When a corporation is empowered to enforce its by-laws by fine and amercement, they are by implication precluded from adopting any other method of enforcing them.⁷ Neither can obedience to a by-law be enforced by the imprisonment of the offender,⁸ or the forfeiture of his

13 Mass. R. 282; *Corporation of Columbia v. Harrison*, 2 R. Constitutional Ct. (N. C.) 213.

¹ *Lutw.* 405; *Cudden v. Estwick*, 6 Mod. 124; *Prigge v. Adams*, *Skin.* 350; *London v. Vanacre*, 12 Mod. 273; *S. C.* 1 *Ld. Ray.* 499; *Pierce v. Bartrum*, *Cowp.* 270.

² *Chamberlain of London's case*, 5 Co. R. 63, b.; *The City of London's case*, 8 Co. R. 253; 3 *Leon.* 265; 2 *Kyd on Corp.* 156; *Willcock on Mun. Corporations*, 154, § 368.

³ *Stevens v. Dimond*, 6 *New Hamp.* 330.

⁴ 2 *Kyd on Corp.* 156; *Willcock, on Mun. Corp.* 154, § 368.

⁵ *Wood v. Searl*, *Bridg.* 141; 3 *Leon.* 8; *Rex v. Newdigate*, *Comb.* 10; 2 *Kyd on Corp.* 157; *Willcock on Mun. Corpor.* 154, § 368.

⁶ *McMullen v. City Council of Charleston*, 1 *Bay, (S. C.) R.* 382.

⁷ *Kirk v. Nowill*, 1 *T. R.* 125, *Buller, J.*

⁸ *Clark's Case*, 5 Co. R. 64; *Chamberlain of London's case*, 5 Co. R. 63;

goods, unless power be expressly given by statute — both these being against magna charta.¹ If either of these modes are adopted, an action of false imprisonment in the one case, and trespass for taking the goods in the other, may be maintained by the injured party against the officer.² Nor, can obedience to a by-law relating to the payment of instalments due on shares of the stock of an incorporated company be compelled, without express authority given by statute, or act of incorporation, by forfeiture of such shares.³ But where, as is sometimes the case, such power is given, the remedy by forfeiture of the stock is cumulative; and does not, deprive the company of the right to proceed by action for the recovery of the calls, or instalments of their subscriptions.⁴ And even after such suit brought, the company may declare a forfeiture of the stock, which cannot be pleaded in bar of the farther maintenance of the suit, where the value of the stock forfeited is not equal to the money due to the company.⁵ In such case, however, the stockholder is entitled, on assessment of damages, to insist, that the value of the stock forfeited shall be allowed in diminution of the sum, which the company would otherwise be entitled to recover.⁶ But where the stock forfeited is equal in value to the amount due to the company, the forfeiture

City of London's case, 8 Co. R. 253; Bab v. Clerk, Moore, 411; London v. Wood, 12 Mod. 686; 3 Salk. 76; Barter v. Commonwealth, 3 Penr. & Watts (Penn.) R. 253; Hart v. Mayor, &c. Albany, 9 Wend. (N. Y.) R. 571.

¹ Player v. Archer, 2 Sid. 121; Clark v. Tucker, 2 Vent. 183; City of London's case, 8 Co. R. 253; 1 Bulstr. 11, 12; 2 Inst. 47; Kirk v. Nowill, 1 T. R. 118; Cotter v. Doty, 5 Ohio R. 395.

² Strode v. Deering, Show. 168; Lamb v. Mills, Skin. 587; Wood v. Searle, Bridg. 139; Clark's case, 5 Co. R. 64; Kirk v. Nowill, 1 T. R. 118.

³ In the matter of the Long Island Rail Road Co. 19 Wend. (N. Y.) R. 37.

⁴ Herkimer Manufacturing & Hydraulic Co. v. Small, 21 Wend. (N. Y.) R. 273; Troy Turnpike & Rail Road Co. v. McChesney, 21 Wend. (N. Y.) R. 296.

⁵ Ibid.

⁶ Herkimer Manufacturing & Hydraulic Co. v. Small, 21 Wend. (N. Y.) R. 273.

may be pleaded in bar, and the plea will be good, provided it avers, that the value of the stock is equal to the amount due.¹

A by-law cannot be enforced by avoiding any bond or covenant made in contravention of it;² nor by disfranchising the offender.³ But it has been held in Pennsylvania, that a by-law of a church corporation, enforcing the payment of a pew-rent, by suspending one in arrear for a longer time than two years of his right to vote for officers, was valid.⁴

2. The general mode of enforcing the penalty of a by-law is, by bringing an action of debt or assumpsit to recover it.⁵ In England it is held, that the penalty of a by-law is recoverable by distress and detention until payment, according to the forms of the common law.⁶ But when a by-law gives power to distrain upon due proof before the master and wardens, there can be no distress before verdict for the penalty; for there is no legal proof other than the finding of a jury.⁷ And, unless there be a special custom, or legislative authority for it, the penalty of a by-law cannot be enforced by distress and sale;⁸ or by detaining the

¹ Ibid.

² *Haracot's case*, Comb. 203; *Doggerill v. Pokes*, Moore, 411.

³ *Rex v. London*, 2 Lev. 201; *Clark's case*, 1 Vent. 327; *Bab v. Clerk*, Moore, 412, contra.

⁴ *Commonwealth v. Cain et al.* 5 Serg. & Rawle, (Penn.) R. 510.

⁵ *Barber Surgeons v. Pelson*, 2 Lev. 252; Clift. 901, 902, cited Com. Dig. By-law, D. 1; Tidd. Prac. 3, 4; *Lee v. Wallis*, 1 Kenyon's Cas. 295; *Wooly v. Idle*, 4 Burr. R. 1952; *Feltmakers v. Davis*, 1 Bos. & Pul. 98; *Adley v. Reeves*, 2 M. & S. 60; *Mayor of London v. Sory*, Carth. 92; *Mayor of Exeter v. Tumlet*, 2 Wils. 95; 2 Constable, (S. C.) R. 215.

⁶ *Clark v. Tucker*, 3 Lev. 281; S. C. 2 Vent. 183; *Bodwic v. Fennell*, 1 Wils. 237; *Clark's case*, 5 Co. R. 64, a.; *City of London's case*, 8 Co. R. 253; *Lee v. Wallis*, Sayer, 263; S. C. 1 Kenyon's Cas. 295; *City of London v. Wood*, 12 Mod. 686.

⁷ *Wood v. Searl*, Bridge. 142.

⁸ *Clark v. Tucker*, 3 Lev. 281; S. C. 2 Vent. 183; *Lee v. Wallis*, 1 Kenyon's Cas. 295; S. C. Sayer, 263; *Adley v. Reeves*, 2 M. & S. 60. The corporation of Albany cannot pass a by-law subjecting a vessel, lying in any basin, dock, &c., to seizure and sale, in case of refusal by the owner, after notice, to remove her; the remedy for enforcing their by-laws being speci-

offender's share of the profits of the company, until the amount shall be sufficient to liquidate the penalty.¹ And a by-law founded on a custom to exclude foreigners, and authorizing a distress for the penalty in case of a breach of the by-law, *without a previous demand and refusal of such penalty*, is bad ; and the defendant, justifying the taking of goods as a distress for a penalty incurred by breach of a by-law, must aver a previous demand and refusal of payment, and must prove that averment, although the by-laws do not exact any such preliminary.² A by-law cannot compel the payment of a penalty, by excluding the offender from all participation in the profits of the company until payment ;³ or by making a stop of his gun proof, which would prevent him from carrying on his trade with equal advantage ;⁴ or by committing him to prison until payment ; though he has assented to the by-law ;⁵ unless there be a special custom, or power granted by statute. In these cases, there is penalty upon penalty.⁶

3. The penalty of a by-law can in general be given only to the corporation injured by the offence against its regulations.⁷ And where the penalty is given in general terms, without specifying to whose use it is to be applied, it is to be understood to the use of the corporation.⁸ The form of reserving the penalty,

fied, and the right to make by-laws creating a forfeiture, not being given. *Hart v. Mayor, &c. of Albany*, 9 Wend. (N. Y.) R. 571.

¹ *Adley v. Reeves*, 2 M. & S. 60 ; S. C. called *Adley v. Whitstable Co.* 17 Ves. Jr. 304.

² *Davis v. Morgan*, 1 C. & J. 587 ; 1 Tyr. 457 ; 1 Price, P. C. 77.

³ *Adley v. Reeves*, 2 M. & S. 60.

⁴ *Gunmakers v. Fell*, Willes, 390.

⁵ 1 Rol. Abr. 363 to 365 ; *Wood v. Searl*, Bridg. 141 ; *Clarke's case*, 5 Co. R. 64. a. ; *City of London's case*, 8 Co. R. 253 ; *Bab v. Clerke*, Moore, 411 ; *Rex v. Clerke*, 1 Salk. 349 ; *Rex v. Boston*, Jones, 162 ; *Rex v. Merchant Tailors*, and *Rex v. London*, 2 Lev. 200 ; *London v. Wood*, 12 Mod. 686 ; S. C. 1 Salk. 397 ; *Barter v. Commonwealth*, 3 Penr. & Watts, (Penn.) R. 253.

⁶ *Adley v. Reeves*, 2 M. & S. 53.

⁷ *Hollings v. Hungerford*, cited in *Bodwic v. Fennell*, 1 Wils. 235 ; *London v. Wood*, 12 Mod. 686.

⁸ 2 Kyd on Corp. 157.

however, is equally good, whether it be to the company, or to the masters, &c. for the use of the company.¹ The penalty cannot be given to a mere stranger,—as, “*to any one who shall sue for the same,*” for this would be like assigning a chose in action, which the policy of the law will not endure.² Upon this principle, it has been held in England, that if the injury be to a particular company, as where a custom excludes foreigners from the practice of a particular trade, or from the practice of the trade of a particular company, as well freemen as foreigners, unless free of that company, the penalty of the by-law founded upon it ought not to be given to the municipal corporation, or their officer, but to the company injured, or their treasurer in trust for them.³ But where a by-law gave a penalty for trading against a custom excluding foreigners, to be recovered by the chamberlain, one third of it for the benefit of the prisoners of the gaol, another third part for the informer, and the other third part remaining undisposed of, was for the use of the corporation; no exception was taken to this distribution of the penalty;⁴ and it appears, says Mr. Willcock, to be unexceptionable, for the division is subsequent to the recovery, and no injury to the defendant.⁵

4. If the by-law does not specify in whose name the action for the penalty is to be brought, it must be brought in the name of the corporation.⁶ And where the penalty is given to the master and wardens of a company, to the use of the master, wardens,

¹ *Graves v. Colby*, 1 Perr. & Dav. (Q. B.) 235.

² *Bodwic v. Fennell*, 1 Wils. 233, 236, 237; *Hollings v. Hungerford*, and *Ellington v. Cheney*, there cited; *Totterdell v. Glazby*, 2 Wils. 266.

³ *Wilton v. Wilks*, 2 Ld. Ray. 1133; S. C. 6 Mod. 21; *Weavers of London v. Brown*, Cro. E. 803; *Bodwic v. Fennell*, 1 Wils. 235; *Hesketh v. Braddock*, 3 Burr. R. 1847; *Wooly v. Idle*, 4 Burr. R. 1951; *York v. Welbank*, 4 B. & A. 440. But see *Tailors of Bath v. Glazby*, 2 Wils. 266.

⁴ *Hesketh v. Braddock*, 3 Burr. 1848; *Player v. Archer*, 2 Sid. 121; *Harris v. Wakeman*, Sayer, 254. When the penalty of a town by-law is to be paid, one half to the informer, and the other half into the treasury of the town, a *qui tam* action therefor may, it seems, be sustained in the name of the informer and the town treasurer. *Bradley v. Baldwin*, 5 Conn. R. 288.

⁵ Willcock on Mun. Corpor. 156, § 373.

⁶ *2 Kyd on Corp.* 157; *Vintners v. Passey*, 1 Burr. R. 235.

and company, the action cannot be maintained in the name of the master, wardens, and company, but must be brought in the name of the master and wardens alone, who would probably declare both in their natural and official capacities.¹ But where the action for the penalty was brought by the master and wardens, who were such at the time the fine was incurred, but had ceased to be so at the time the action was commenced, a plea, that the plaintiffs were not master and wardens, was held good.² If the by-law, as it may, limits the penalty to be recovered by the chamberlain or treasurer of the corporation, for the use of the corporation, the action must be brought in the name of the chamberlain or treasurer.³

5. If the chamberlain or treasurer sue for the penalty, it is sufficient for him to allege that he is chamberlain or treasurer, and it is not necessary for him to set forth or show in what manner he was elected, or appointed.⁴ He must, however, set forth and show that the penalty was made payable to, and recoverable by him.⁵ Where the by-law is made by virtue of the incidental power in the body at large, it is not necessary to set forth the authority of the corporation to make it. But if it be made by virtue of a special power of making by-laws, the special authority must be set out in the pleadings, and proved, and also, that it

¹ *Feltmakers v. Davis*, 1 B. & P. 101. But see *Totterdell v. Glazby*, 2 Wils. 266.

² *Graves v. Colby*, 1 Perr. & Dav. (2 B.) 235. And *it seems* that the right of action did not pass to the succeeding master and wardens. But *Qu. Ibid.*

³ *Chamberlain of London's case*, 5 Co. R. 63 b; *Harris v. Wakeman*, Sayer, 254; *Hollings v. Hungerford*, cited 1 Wils. 235; *Bodwic v. Pennell*, 1 Wils. 235, 236, 237; *Hesketh v. Braddock*, 3 Burr. R. 1847, 1854; *Feltmakers v. Davis*, 1 B. & P. 101, 102. The statute of 1802, regulating the town of Hillsborough, (N. C.) enables the treasurer of the town to sue in his own name for penalties incurred under the by-laws authorized thereby, as well as for those incurred under the statute itself. *Watts v. Scott*, 1 Dev. (N. C.) R. 291.

⁴ *Harris v. Wakeman*, Sayer, 256; *Hollings v. Hungerford*, there cited by *Ryder*, C. J.

⁵ *Exon v. Starre*, 2 Show, 159.

was made by the select body in whom such power was vested, and at what time it was made.¹ In an action of debt for the penalty of a by-law, the by-law itself must be fully set out, and not by way of mere recital; and it is not sufficient to aver that the defendant incurred the penalty by the breach of a certain by-law.² In an action of assumpsit founded upon a by-law, it would seem that this averment was sufficient, the same strictness of pleading not being required in this form of action; since after all it comes to a question on the evidence, what legal consideration there is to raise and support the promise.³ It must appear by proper averments in the proceeding, that the defendant was subject to the by-law; though if this be once shown, it is not necessary to aver formally that he was so at the time the offence was committed; for it having been stated that he became a member of the corporation, it will be presumed that he continued one, until the contrary appear.⁴ It is, however, never necessary to aver that the defendant had notice of the by-law; for every one subject to the action of a law is presumed to know its import,

¹ *Rex v. Lyme Regis*, 1 Doug. 157, 158, 159; *Feltmakers v. Davis*, 1 B. & P. 100, 101; *Rex v. Decan et Capital*, Dublin, 1 Str. 539; *Dunham v. Trustees of Rochester*, 5 Cowen, (N. Y.) R. 462.

² *Com. Dig. Pl. 2, W. 11*; 2 Vent. 243; 1 Bro. Ent. 170; *Gerrish v. Rodman*, 3 Wils. 155, 164; *Feltmakers v. Davis*, 1 B. & P. 102. For form of declaration in debt on by-law, see *Stuyvesant v. Mayor, &c. of New York*, 7 Cowen, (N. Y.) R. 606. A statute, which renders it unnecessary in prosecutions on the by-laws of the city of Boston, to set forth the by-law at large, does not conflict with the constitution of Massachusetts. *Commonwealth v. Worcester*, 3 Pick. (Mass.) R. 462. A complaint for the breach of a by-law of the city of Boston, concluding, "against the form of the by-law, in such case made and provided," is not sufficient, unless it conclude also, "against the form of the statute, &c." *Commonwealth v. Gay*, 5 Pick. (Mass.) R. 44. See also *Commonwealth v. Worcester*, 3 Pick. (Mass.) R. 475; *Stevens v. Dimond*, 6 New Hamp. 331.

³ *Barber Surgeons v. Pelson*, 2 Lev. 252; 1 B. & P. 101, n. b; *Willcock on Mun. Corp.* 173, § 426. But see *Feltmakers v. Davis*, 1 B. & P. 101, 102; *Eyre, C. J.* For Pleadings in Replevin on distress, see *Gerrish v. Rodman*, 3 Wils. 171.

⁴ *Colchester v. Goodwin*, Carter, 119; *Gunmakers v. Fell*, Willes, 390; *Ex parte Eden*, 2 M. & S. 229.

as is his duty.¹ If the by-law except certain classes of persons from its operation, and the exception be material, it is necessary to aver that the defendant is not within the exception in a return to a writ of *habeas corpus cum causa*;² and it is necessary to state in such a return every thing necessary to be stated in an action of debt in a superior court, and no more.³ But when in a by-law, making certain regulations, for breach of which parties are liable to be sued for a penalty, there is a separate proviso, making certain exceptions, a party suing for breach of the by-law need not aver in the declaration, that the case was not within the exception in the proviso; but such fact, if it exist, must be shown by the defendant by way of excuse.⁴ If a by-law, imposing a duty on a member, contain a condition precedent to his liability thereto, the declaration must aver a performance of the condition, or it will be bad.⁵ Where the by-law, after imposing the penalty, declares that if the offender "deny, refuse, or neglect," to pay the penalty, it shall be recoverable in an action of debt, it is not necessary to aver a demand; though, had the word "neglect" been omitted, perhaps it might have been presumed that an indulgence was intended, and a demand necessary before an action could be maintained.⁶

In an action by a society of innholders for the penalty of a by-law imposed upon those, who, being elected, refused to accept the livery and clothing of the company, it was held that it was necessary to state in the declaration that the company of innholders has a livery, since the court will not notice what companies have, and what have not a livery.⁷ And in an action to recover a penalty for refusing an office, it is not necessary to aver that

¹ *London v. Bernardiston*, 1 Lev. 16; *James v. Tutney*, Cro. Car. 498.

² *Rex v. Abington*, Salk. 432; *Rex v. Coopers of Newcastle*, 7 T. R. 547.

³ *Watson v. Clerke*, Carth. 75; 2 Kyd on Corp. 170; *Willcock on Mun. Corpor.* 174, rule laid down generally.

⁴ *Carmathen Mayor, &c. v. Lewis*, 6 C. & P. 608.

⁵ *Carter v. Sanderson*, 5 Bingham, R. 79; S. C. 15 Serg. & Lowb. 371.

⁶ *Butchers v. Bullock*, 3 B. & P. 434, 437.

⁷ *Innholders v. Gledhill, Sayer*, 275; *Rex v. Clerke*, 1 Salk. 349.

the defendant had notice of his election, nor when or where the meeting at which he was elected was held ; for these he is presumed to know.¹ To such an action, the defendant may either plead specially a seasonable excuse, or give it in evidence under the general issue.²

§ 9. Although, as we have seen, the adoption of a code of by-laws may sometimes be proved by implication,³ yet in general, in order to prove what they are, it is necessary that they should be produced ; and parol proof of their contents, as in case of the by-laws of a bank, by the cashier, is insufficient.⁴ In England, it is held, that where a by-law is pleaded to have been made and lost, the jury may, from ancient and unvaried usage, though within time of memory, in conformity to it, find the facts of its having been made in the terms set forth, and since lost ; particularly if the usage be traced to a period when an alteration, like that contained in the by-law, was suddenly introduced ; and this too, whether the corporation be by prescription or charter.⁵ Sixty years' usage has been considered evidence of a by-law.⁶ If the jury only find, however, that such an usage has prevailed from a time within memory, without finding a by-law, the alteration supposed to have been made by the by-law cannot be sustained, whether the corporation be ancient or modern ; it cannot as a by-law, since no by-law is found ; nor as a custom ; for though in an ancient corporation, usage within time of memory may be *evidence of a custom*, yet if a period be shown at which the contrary prevailed, that evidence is rebutted.⁷ Corporators are not

¹ *London v. Vanacre*, 5 Mod. 442 ; S. C. 1 Ld. Ray. 500 ; *Vintners v. Passey*, 1 Burr. R. 239.

² *Ibid* ; *Rex v. Leyland*, 3 M. & S. 188.

³ *Union Bank v. Ridgeley*, 1 Har. & Gill. (Md.) R. 324 ; *supra*, § 1.

⁴ *Lumbard v. Aldrich*, 8 New Hamp. R. 35.

⁵ *Case of Corporations*, 4 Co. R. 78 ; *Rex v. Tomlyn*, C. T. H. 316 ; *Rex v. Miller*, 6 T. R. 280 ; *Rex v. Westwood*, 4 B. & C. 786. And see *Taylor v. Griswold*, 2 Green, (N. J.) R. 223 ; *Rex v. Atwood*, 1 Nev. & M. 286 ; S. C. 4 B. & Adolph. 699.

⁶ *Perkins v. Cutlers Company*, 1 Selw. N. P. 1144, Mansfield.

⁷ *Rex v. Westwood*, 4 B. & C. 786.

competent witnesses to prove a custom of excluding strangers from exercising trades within a town, where a moiety of the penalty, imposed by a by-law for the breach of that custom, goes to the corporation ; nor even, it seems, though that moiety be granted away by them, by the by-law, to a company.¹ It has been decided in Massachusetts, that the legislature of that State may constitutionally enact, that the interest, which an inhabitant of a city may have in a penalty for the breach of a by-law thereof, shall not disqualify him to act as judge, juror, or witness, in a prosecution to recover the penalty ; and that such prosecution may be in the name of the commonwealth.²

¹ *Davis v. Morgan*, 1 C. & J. 587 ; 1 Tyr. 457 ; 1 Price, P. C. 77.

² *Commonwealth v. Worcester*, 3 Pick. (Mass.) R. 462.

CHAPTER XI.

OF THE POWER TO SUE, AND THE LIABILITY TO BE SUED.

WE have now arrived at the consideration of the power of a corporation to sue, and of its liability to be sued by its corporate name. And here we will repeat what was said by Chief Justice Tilghman, in giving the opinion of the Supreme Court of Pennsylvania, in 1818, — “corporations have been lately so multiplied in the United States, that it has been necessary to consider with great attention their nature and their rights, both as to suing, and being sued.”¹ We shall now proceed to show what actions corporations may bring, what actions may be brought against them, their power to sustain suits out of their jurisdiction, or State, and their liability to be sued out of their jurisdiction, or State, &c.

§ 1. It is now well settled, that corporations may commence and prosecute actions for all injuries done to the body corporate; and upon all promises made to them, where the contract was within the scope of their design and authority. They may have a writ of right, as any tenant in fee-simple may;² and may prosecute such real actions, and possessory suits as are applicable to their case.³ And they may bring actions of trespass, on the case, *indebitatus assumpsit*, &c., in order to assert their rights when invaded, or obtain a recompense for any injury that can be done to them. This general rule is well settled, and has been long established.⁴ It has, however, quite lately been made a question in England, whether a corporation aggregate can sue, in

¹ *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle, (Penn.) R. 16.

² 1 Kyd, 185.

³ *Ibid.* 187; 1 Chitty on Plead. 102; *Gospel Society v. Wheeler*, 2 Gallison, C. C. R. 105.

⁴ *Com. Dig. Tit. Franchise*, and 1 Kyd, 187, &c.

an action for use and occupation, a tenant who has occupied lands of the corporation *without deed*, and it was held by the Court of Common Pleas in the affirmative ; Best, C. J. observing, that if a promise could not be implied, an action for use and occupation could never be brought by a corporation.¹

Two incorporated companies may unite in an action of *assumpsit*, to recover a sum of money deposited in a bank in their joint names. Not being partners, they are tenants in common, and in that character, there is no objection to their joining in a suit.² It cannot be necessary for this purpose, to decide whether it be in the power of the two corporations, who are plaintiffs, to consolidate their stock, or to form a partnership. General principles are against the power of corporations to do such acts.³

If an injury is done to one of the members of a corporation, by which the company at large are put to any damage, they may sue on that account. Thus, if a public corporation are bound to elect a new mayor every year on a particular day, under the penalty of £10, and the mayor is without good cause imprisoned, so that they cannot observe the day, by which the penalty is incurred ; or if they are bound to appear annually in the exchequer, under a penalty, and they cannot observe the day on account of the mayor's imprisonment, by which they lose the penalty, the corporation may have an action for that imprisonment.⁴

It is laid down by Mr. Kyd, that where an action is given to a common informer to sue for a penalty by the words, "any person or persons," a corporation aggregate cannot sue as a common informer.⁵

¹ *Mayor of Stafford v. Till*, 4 Bing. 54. And in favor of the ability of a corporation, to sue on any contract not executed by deed, see *City of London Gas Light Company v. Nicolas*, 2 Car. & Payne, 365, and *Southwark Bridge Company v. Silla, &c.*, *ibid.* 371.

² *New York and Sharon Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) R. 412.

³ *Ibid.*

⁴ 1 Kyd, 190, who cites *Brian*, C. J. 21 Ed 4 ; *Bro. Corpor.* 63.

⁵ 1 Kyd, 218. Mr. Kyd says it was so held, on 7 Geo. 2, c. 7, in *G. B.*, and refers to *Strange*, 1241.

§ 2. In the late case of the Trenton Banking Company, in New Jersey, it was moved by the defendant's counsel, to quash a writ of foreign attachment, on the ground of the insufficiency of the affidavit, which was made by the *attorney* of the Trenton Banking Company. It was said by the court that "a construction of the act respecting attachments would be unsound and indefensible, and entirely inconsistent with the intention of the legislature, which should preclude a corporation from suing out a writ of attachment; as must be the result, if the act be so construed as to require the affidavit from the corporation itself, or to deny the use of the writ without such affidavit. The law, which gives existence to the corporation, which allows it to sue and be sued, necessarily confers on it the authority to perform by its agents, by whom alone it can act, incidental services like that in question. The affidavit may be made, or the right of the corporation to sue must be unreasonably narrowed, by a person acting in this respect under the authority of the corporation, and possessed of the requisite knowledge to make such an affidavit as the law prescribes."¹

§ 3. An incorporated company has only to show, that it has been regularly and effectually made a corporate body, to enable it to sustain a suit beyond the jurisdiction within which it was constituted. Thus, in the case of the Dutch West India Company, it was long since decided in England, both in the King's Bench and Common Pleas, that a Dutch Corporation might sue in England, though the objection was made, that it could not maintain a suit, on account of its foreign character.² And it has been more recently held, that a foreign corporation may maintain an action of assumpsit in England by their corporate name.³ In the case of the National Bank of St. Charles, in the Kingdom of Spain, which sued in England in its corporate capacity, letters of the defendant were put in and read, in which he

¹ Trenton Bank v. Haverstick, 6 Halsted, (N. J.) R. 171.

² Dutch West India Company v. Henriques Van Moyses, 2 Ld. Raym. 1535; 1 Str. 612.

³ Chitty on Contracts, 86, who cites 1 Ryan & Moody, 190.

admitted, that he held in his hands a very large sum of money, the property of the bank. A witness produced a copy of the Charter of the King of Spain, incorporating this bank. He, at the same time stated, that he procured this copy from the office of the Council of Castile, which is the proper place for charters of this kind to be kept, and that he examined this copy with the original charter. The jury on being asked by the Court, whether this bank in question was the one incorporated by the King of Spain, having answered in the affirmative, the verdict was for the plaintiff.¹ Indeed, it may in England be deemed well settled, that after it has been proved, like any other matter of fact, that an association of persons, who bring a suit in any foreign court by a corporate name, have been incorporated, there is no more reason why their suit should not be sustained, than there is why the suit of a natural individual, who is a foreigner, should not be.

Every argument in favor of entertaining, in American Courts, suits by corporations created by the laws of a country, not forming part of the American confederacy, applies with still greater force to corporations of the States composing the confederacy. It was said by Judge Cabell, of Virginia, in a case before him respecting the power of a foreign corporation to sue abroad, "It is rendered doubly necessary by the intimacy of our political union, and by the freedom and frequency of our commercial intercourse."² In an action where the defendants pleaded in abatement, that the "Portsmouth Livery Company" was not a body incorporated by the legislature of Massachusetts; and where it was said, that the damages should have been demanded, in the name of *all the persons constituting the said company, suing in their private and individual capacities*; the court said, that the principle, suggested by the plea, had no foundation in any maxim, or in any argument of public policy. That the legislature of the State recognised in many instances, and to many

¹ *National Bank St. Charles v. De Bernales*, 1 C. & Payne, 569; and see *Beverly v. Lincoln Gas Light Co.*, 6 Adolph. & Ellis, 829.

² *Bank of Marietta v. Pindalf, &c.*, 2 Rand. R. 465.

purposes, corporations existing by foreign laws ; and that the power of a corporation to sue a personal action, within the State of Massachusetts, was not restricted to corporations created by the laws of that State, as was supposed by the plea in abatement. The plea accordingly was held to be insufficient.¹ Nothing is better settled, say the Supreme Court of Illinois, than that corporations may institute suits in the courts of other States and countries, than those under whose laws they have been established.²

Trustees of a foreign corporation, appointed by a court of equity, may maintain an action in their own names upon a negotiable note, which came to their hands with other assets of the institution.³ The question has been raised and decided in Virginia, whether a bank established in another State is empowered to prosecute actions in Virginia, on a contract made in Virginia. The plaintiffs were the Marietta Bank, incorporated by a law of the State of Ohio ; and the action was an action of debt brought before the Superior Court of Virginia, against M. P. and W. severally, on promissory notes executed to third persons, made payable at the bank of Marietta, and assigned to the plaintiffs. The defendants put in special pleas stating in substance, that the notes were made and signed by them, and endorsed by the payees, within Virginia ; and that the plaintiffs were not a corporate body by the laws of that State. The Court, (though as a general rule they allowed, that a corporation created by the laws of one State might sue in another,) yet, under the above circumstances, held, that the plaintiffs could not sue. The Court said, that it would not be permitted to a bank in Ohio to establish an agency in Virginia for discounting notes, or for carrying on any other banking operations ; nor could they sustain an action on any note thus acquired by them. But they said, there was nothing in the policy of the laws of Virginia, which restrained its citizens from promoting their accommodation and interests by borrowing money

¹ Portsmouth Livery Company v. Watson, 10 Mass. R. 91.

² Holcomb v. Illinois, &c. Canal Co., 2 Scammon, (Ill.) R. 237.

³ Stewart v. Insurance Co., 9 Watts, (Penn.) R. 126.

from a bank in Ohio ; nor was it the policy of its laws to restrain one citizen in Virginia from executing to another citizen or to a foreigner a note payable at a banking house legally constituted in Ohio ; nor to prevent such bank from taking an assignment of such note by discounting it in Ohio ; and a debt thus contracted ; the Court said, might be recovered by the bank by suit in Virginia. The Court, in giving judgment, further remarked ; “ It was earnestly and with great appearance of reason contended, by the counsel for the appellants, that, as incident to the right of recovering, in Virginia, a debt acquired by an original and legal contract in Ohio, they might legally make a *secondary* contract in Virginia, for carrying into effect the assignment of a note, or other chose in action, in payment of a debt, originally and legally contracted in Ohio. But as this point does not necessarily present itself, we forbear to express any opinion upon it.¹

And a corporation may sue in a foreign court of equity as well as in a foreign court of law. In the case of *Silverlake Bank v. North*, in the court of chancery of New York,² one ground of defence was, that the plaintiffs, being a corporation created in Pennsylvania, had no capacity to sue in New York, as a banking corporation. But Chancellor Kent said, that he could see nothing in the objection which was even plausible ; and he considered it well settled, that foreign corporations might sue in New York in their corporate name, and might prove, as a matter of fact, if the same were denied, that they were lawfully incorporated. The Court of Chancery, said the Chancellor, should be as freely open to such suitors as a court of law ; and it would be most unreasonable and unjust to deny them that privilege. They might well, he said, exclaim,

Quod genus hoc hominum ?

———hospitio prohibemur arenæ.

¹ *Bank of Marietta v. Pindalf*, 2 Rand. R. 465.

² *Silverlake Bank v. North*, 4 Johns. (N. Y.) Ch. R. 370 ; and see also *New York Fire Ins. Co. v. Ely*, 5 Conn. R. Corporations of other States may sue in Louisiana. *Christy's Digest*, 91, who cites *Williamson v. Smoot*, 7 Martins. (La.) R. 31 ; *President, &c. of Lombard Bank v. Thorp*, 6 Cowen, (N. Y.) R. 46 ; *Hartford Bank v. Barry*, 17 Mass. R. 97.

But a foreign corporation keeping an office in the State of New York, for receiving deposits and discounting notes, without being expressly authorized by an act of the State to do so, cannot maintain an action for the money loaned, either on a note or other security, taken on such loans or on a count for money lent. This decision was made under the Revised Laws of that State.¹

§ 4. The right of a corporation to litigate in the federal courts of the United States depends upon the character (as to *citizenship*) of the members who compose the body corporate; for an aggregate corporate body, as such, is not deemed to be a citizen within the meaning of the constitution.² In the case of the *Bank of the United States v. Deveaux*,³ the record presented two questions; first, whether a body politic, composed exclusively of citizens of one State, can sue a citizen of another State in the Circuit Court of the United States; secondly, whether the Bank of the United States had not a peculiar right to sue in that Court. The opinion was given by Marshall, C. J., who as to the first point said, that a corporation could not sue or be sued in the courts of the United States, unless the rights of the members, in this respect, could be exercised in their corporate name. If the corporation, he said, be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union. He then alluded to the general views and impressions,

¹ *New Hope, &c. Bridge Co. v. Silk Co.* 25 Wend. (N. Y.) R. 548, and New York Rev. Stat. 373, § 2.

² *Hope Insurance Company v. Boardman*, 5 Cranch, 57. A case is reported in the 12 Mod., which is precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered was brought before the King's Bench, and reversed, because the court was deprived of its jurisdiction, by the character of the individuals who were members of the corporation. This case was cited as applicable by Marshall, C. J. in *Bank of United States v. Deveaux*, 5 Cranch, 90.

³ *Bank of United States v. Deveaux*, 5 Cranch, 61.

with and under which the judicial department had been introduced into the American constitution, as follows. "However true the fact may be, that the tribunals of the States will administer justice, as impartially as those of the Union, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between *aliens* and a *citizen*, or between *citizens of different states*. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name indeed cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted, substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."¹ If the *constitution*, he thought, would authorize congress to give the courts of the union jurisdiction in this case, in consequence of the character of the members of the corporation, then the *judicial act* ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws; that is, to describe the real persons who come into court, in this case, under their corporate name.

¹ Such had previously been the universal understanding on the subject; and the U. S. Supreme Court had before repeatedly decided causes between a corporation and an individual, without feeling a doubt respecting its jurisdiction. Those decisions were referred by Mr. C. J. Marshall, not as authority, because they were made without considering this particular point, but as showing, that the common understanding of intelligent men had been in favor of the right of incorporated citizens of a different State from the defendant, to sue in the national courts.

By a later authority, to entitle a corporation to sue in the circuit courts of the United States, all the members of that corporation must be citizens of some State of the United States, other than that State of which the defendant is a citizen. And the averments must be so made in the declaration, in order to entitle the Court to take jurisdiction of the case.¹ It is not sufficient to give jurisdiction to the courts of the United States to allege, that a party is an *alien*. There must also be an allegation, that he is a subject or citizen of some one foreign state.²

§ 5. As to the question raised in the above case, whether the old *United States Bank*, by virtue of its act of incorporation was empowered to sue in the federal courts of the Union, the opinion as given by Marshall, C. J., was as follows ;

“ The judicial power of the United States, as defined in the constitution, is dependent, 1st. On the nature of the case ; and, 2d. On the characters of the parties.

“ By the judicial act, the jurisdiction of the circuit courts is extended to cases, where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties ; but the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State, claiming land under grant from different States.

“ Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the judicial act, the Bank of the United States had not a right to sue in that court, upon the principle, that the case arises under the law of the United States.

“ The plaintiffs contend, that the incorporating act confers this jurisdiction.

“ That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it ‘ to sue and be sued, plead and be impleaded, answer and be answered, defend

¹ *Bank of Cumberland v. Willis*, 3 Sumner, C. C. R. 472.

² *Wilson v. City*, Ibid. 422.

and be defended, in courts of record, or any other place whatsoever.'

"This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be.

"But the 9th article of the 7th section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved, by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or State courts.

"This evinces the opinion of Congress, that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognises the right of the patentee to sue in the circuit courts of the United States.

"The court, then, is of opinion, that no right is conferred on the Bank, by the act of incorporation, to sue in the federal courts."

§ 6. It was settled in the before mentioned case of Bank of the United States v. Deveaux, that a foreign corporation in the character of its members, as *aliens*, may sue in the federal courts of the United States; and that these courts will go behind the corporate name, and see who the parties really interested are. This was recognised as an established rule by Mr. J. Story, in the year 1814, in a suit instituted in the circuit court for the district of New Hampshire, by a religious corporation constituted in England, by the name of the *Society for the Propagation of*

*the Gospel in foreign parts.*¹ The members of this society were aliens and subjects of the king of Great Britain. Pending the suit a war intervened between the two countries. It was considered by his Honor, that there was no pretence for holding, that the mere alienage of the demandants would form a valid bar to a recovery, supposing the two countries *to be at peace* ; and the whole objection he considered rested on the war which then existed.

It seems then, that in the case above cited, the direct question was presented, whether a foreign corporation might maintain a suit in the courts of the United States, during war. The Judge considered, that there were two objections to the rendition of judgment for the demandants. First, the corporation itself, being established in the enemy's country, acquired the enemy's character from its domicile ; Secondly, that the members of the corporation were subjects of the enemy, and therefore personally affected with the disability of hostile alienage. As to the first objection the Judge observed ; " In general, an aggregate corporation in law is not deemed to have any commorancy, although the corporators have ;² yet there are exceptions to this principle ; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may ; and if the country become hostile, it may, for some purposes at least, be clothed with the same character. Even in respect to mere municipal rights and duties, an aggregate corporation has been deemed to have a local residence. It has been held to be an " inhabitant " under the statute for the reparation of bridges ;³ and an " inhabitant and occupier," liable to pay poor rates, under the statute, 43 El. ch. 2.⁴ It may

¹ *Society for the Propagation of the Gospel, &c. v. Wheeler*, 2 Gallison, R. 105. In cases where justice requires it, the court will look into the residence of the individual members of a corporation, and if such members can sue in any court, by right of citizenship, the corporation may also sue. *Lexington Man. Co. v. Dorr*, 2 Lit. (Ky.) R. 256.

² *Inhabitants of Lincoln County v. Prince*, 2 Mass. R. 544.

³ 22 H. 8, ch. 5 ; 2 Inst. 697, 703.

⁴ *Rex v. Gardner*, Cowp. 83.

therefore acquire rights, and be subject to disabilities, arising from the country, if I may so express myself, of its domicil. And, indeed, upon principle or authority, it seems to me difficult to maintain, that an aggregate corporation, as for instance an insurance company, a bank, or a privateering company, established in the enemy's country, could, merely from its being an invisible, intangible thing, a mere incorporeal and legal entity, be entitled to maintain actions, to enforce rights, acquire property, or redress wrongs, when its own property on the ocean would be good prize of war. If the reason of the rule of the disability of an alien enemy be, as is sometimes supposed, that the party may not recover effects, which, by being carried hence, may enrich his country, that reason applies as well to the case of a corporation, as of an individual, in the hostile country. If the reason be, as Lord Chief Justice Eyre, in *Sparenburg v. Barnatine*,¹ asserts it to be, that a man professing himself hostile to our country, and in a state of war with it, cannot be heard, if he sue for the benefit and protection of our laws, in the courts of our country, that reason is not less significant in the case of a foreign corporation, than of a foreign individual, taking advantage of the protection, resources, and benefits of the enemy's country. In point of law, they stand upon the same footing. It has been argued, that the Court will look to the purposes, for which the corporation was instituted, and to the conduct, which it observes; if these be innocent or meritorious, they afford an exception from the general rule. But it is not the private character or conduct of an individual, which gives him the hostile or neutral character. It is the character of the nation, to which he belongs and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion, and humanity, and yet his domicil will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavor by all lawful means to assuage or extinguish it, and yet, while he continues in the country, he is known but as an enemy. The same principle must apply, in the same manner, to a corpora-

¹ 1 Bos. & Pull. 163.

tion. The objects, indeed, of the present corporation are highly meritorious and worthy of public favor ; but, upon the doctrines of law, it must be deemed a British alien corporation, and as such liable to the imputation of being an enemy's corporation, unless it can be protected upon other principles."

But although the opinion of the court was, that the corporation itself and the members also were alien enemies, yet for aught that appeared on the face of the record, every member of the corporation might then be domiciled in the United States under the license of government. And in respect to the corporation itself, although established in Great Britain, it might have had the safe conduct or license of the United States government, for its property and corporate rights. This was one reason why the court sustained the power to sue, notwithstanding their opinion upon the abstract question of right. And another consideration, which the court thought would weigh in the case, was, that the suit was commenced during peace, and on the declaration of war, it was competent for the tenants to plead the hostile alienage of the demandants, if it existed, in bar to the further prosecution of the suit, in the nature of a *puis darrein continuance*. And as they did not so plead, they thereby affirmed the ability of the demandants to prosecute to judgment.¹

¹ *Le Bret v. Papillon*, 4 East, 502 ; and also *West v. Sutton*, 2 Lord Raym. 853, were cited by the court. Another consideration which the court mentioned, as one which was in favor of their overruling the motion in arrest of judgment, was thus stated by Judge Story ; " Another consideration, derived from the express provision of the 9th article of the British Treaty of 1794, ought not to be omitted. That article stipulates, that British subjects, who then held land in the territories of the *United States*, and American citizens, who then held land in the dominions of His Majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and may grant, sell, and devise the same, to whom they please, in like manner as if they were natives ; and that neither they, nor their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be regarded *as aliens*. This article has never been annulled, and therefore remains in full force. It deserves, and ought to receive, a liberal and enlarged construction. There can be no doubt, that corporations, as well as individuals, are within its purview ; and the present claim not only may be, but in fact is, one which it completely embraces. The

§ 7. The ancient doctrine was that the action of *assumpsit* could not be supported against a corporation, unless in the case of promissory notes, and other contracts sanctioned by particular legislative provisions.¹ And as late as 1799, in a case in the Supreme Court of Pennsylvania, the question arose upon a special verdict, whether an action of *indebitatus assumpsit*, upon an implied promise, could be maintained against an incorporated turnpike company, as a corporation could only contract by deed under the corporate seal; and the court held, that on the ground stated, the company was not liable to be sued in that form of action.² But it having since become well settled, by the more

title of the demandants, as has been already stated, accrued before the revolutionary war. It was obviously the design of the contracting parties, to remove the disability of alienage, as to persons within the purview of the article, and to procure to them a perfect enjoyment and disposal of their estates and titles. If, during war, their right to grant, sell, or devise such estates and titles were suspended, it would materially impair their value. If the remedies incident to such estates for trespasses, disseisins, and other tortious acts, were during war suspended, not only would the security of the property be endangered, but if war should last for many years, the statute of limitations of the various States would, by lapse of time, bar the party of his remedy, and in some cases of his estate. This seems against the spirit and intent of the article, and puts the party upon the footing of an alien enemy, while the language concedes to him all the benefits of a native. Looking to the general moderation, with which the rights of war are exercised in modern times, under the policy, if not the law, of nations; perhaps it would not seem (for I mean not to give any absolute opinion) an undue indulgence, to hold, that as to all titles and estates within the article, an alien enemy may well maintain all the legal remedies, as in a time of peace. At least, it cannot be presumed, that in this favored class of cases, the party has not received the license or safe conduct of the government, to pursue his rights and remedies during the war. And unless such presumption can be made, when there are no facts on the record to warrant it, the plaintiffs must be entitled to judgment."

¹ 1 Chit. on Pleading, 102; 6 Vin. 317, pl. 49; 16 East, 611. Where the power of a trading, or other corporation, to draw and accept bills is recognised by statute, *assumpsit* lies against it; although in England, says Mr. Chitty, an action of debt is generally the only remedy against a corporation. Chitty on Contracts, 86; and see *Murray v. East India Co.* 5 B. & Ald. 204; 5 East, 239.

² *Breckbill v. Turnpike Co.* 3 Dallas, (Penn.) R. 496; and see *Marine Ins. Co. v. Young*, 1 Cranch, 332.

recent decisions of the courts of the United States, that corporations may act by parol,¹ it has resulted, as a matter of course, that assumpsit will lie against a corporation; and such is now the established doctrine in this country. The Supreme Court of Massachusetts, a number of years since decided, that assumpsit would lie against a corporation, where there is an express promise by an agent of the corporation, or a duty arising from some act, or request of such agent, within the authority of the corporation.² And in a very late case in the same State, it was held that either an action of debt on assumpsit may be maintained upon an implied promise, for labor done and materials found, under a special contract, which has not been performed on the part of a corporation.³ In a case in the Supreme Court of the United States, an attempt was made to distinguish between express and implied promises, as to the liability of corporations to be sued.⁴ But the distinction was disregarded, and the court went the whole length, of giving the same remedies against incorporated companies, in matters of contract, as against individuals. The old cases are there reviewed, showing that the law has been progressively altering, with respect to the validity of acts done by corporations, not under their seal. The court observe upon the English authorities referred to, that as soon as it was settled, that a regularly appointed agent of a corporation could contract in its name, without a seal, it was impossible to maintain any longer, that a corporation was not liable upon promises; otherwise there would be no remedy against the corporation; and the court concluded by saying, that it is a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of the corporation, all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed upon them by law, and all benefits conferred at their request, raise

¹ See Chap. VII. and VIII. as to power and mode of contracting.

² *Hayden v. Middlesex Turnpike Co.*, 10 Mass. R. 39.

³ *Smith v. Congregational Meeting House*, 8 Pick. (Mass.) R. 178.

⁴ *Bank of Columbia v. Patterson*, 7 Cranch, 299.

implied promises, for the enforcement of which an action will lie. In the Supreme Court of New York also, Mr. Chief Justice Thompson held expressly, that assumpsit will lie against a corporation on an implied promise. In this case, a turnpike company covenanted to pay money, and a part had been paid; assumpsit, the court held, would lie on the implied promise to pay the balance.¹ And in another case in New York, it was held, that assumpsit would lie against the corporation on the implied promise to pay the amount of damages, assessed by a jury, for the land of the plaintiff taken by the corporation.² The same is the general rule in Pennsylvania;³ and in New Jersey;⁴ and we believe throughout the country.⁵ And in an action of assumpsit against a corporation, it makes no difference whether the agent who makes the contract in behalf of the corporation was appointed under seal or by vote.⁶

A corporation, or bank, in which stock is entirely loaned in another State, and created by its laws, may, nevertheless, be sued in the courts of Louisiana.⁷

§ 8. It has been held even in England, that a special *action on the case* will lie against a corporation, to compel a transfer of stock; and a special action of assumpsit was afterwards brought

¹ Danforth v. President, &c. of S. & D. Turnpike Road, 12 Johns. (N. Y.) R. 227.

² Stafford v. Corporation of Albany, 6 Johns. (N. Y.) R. 1; S. C. 7 Johns. (N. Y.) R. 541.

³ Chestnut Hill Turnpike Co. v. Rutter, 4 S. & Rawle, (Penn.) R. 16; Overseers of N. Whitehall v. Overseers of S. Whitehall, 3 S. & Rawle, (Penn.) R. 117.

⁴ Baptist Church v. Mulford, 3 Halsted, (N. J.) R. 182.

⁵ See also Worcester Turnp. Corporation v. Willard, 5 Mass. R. 80; Gilshore v. Pope, 5 Mass. R. 491; Andover and Medford Turnp. Co. v. Gould, 6 Mass. R. 40; Dun v. Rector, &c. of St. Andrew's Church, 14 Johns. (N. Y.) R. 118; Randal v. Van Vechten, 19 Johns. (N. Y.) R. 60; Quin v. Harford, 1 Hill, (N. Y.) R. 82.

⁶ Bank of the Metropolis v. Guttschlieck, 14 Peters, (U. S.) Co. R. 19.

⁷ Martin v. Branch Bank, 14 Lou. R. 415.

against the bank.¹ In a case in New York, where a motion was made for a *mandamus*, to be directed to the president, directors, and company of the Mechanics Bank, commanding them to permit M. S. to transfer eight shares of the capital stock of the bank standing on the books of the bank; the court refused to allow that remedy, and said there was an adequate remedy by a special action on the case, to recover the value of the stock, if the bank unduly refused to transfer it.² So in *Gray v. The Portland Bank*, it was held by the Supreme Court of Massachusetts, that a special action on the case lies against an incorporated bank, for refusing to permit an original stockholder to subscribe and hold the new stock created by the corporation. So too, in an action of *assumpsit* against the Franklin Insurance Company, it was held that the company was liable in damages, to persons to whom shares had been conveyed by a stockholder, for refusing to enter upon the books, the transfer which the stockholder had made.³

§ 9. Though it has been supposed, that a corporation cannot be sued in that character for torts, and that the action must be brought against each person who committed the tort by name;⁴ yet it is clear, that incorporated companies may at least be sued in their corporate character for damages arising from neglect of duty, and for *trover*.⁵ The Supreme Court of Pennsylvania considered, that if any injury was done by the agents of corporations in the course of their employment, the corporation should be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business; that the act of the agent was the act of the principal; and that there was

¹ *Rex v. Bank of England*, Doug. R. 424, cited in *Danforth v. President, &c. of S. & D. Turnp. Co.* (supra.)

² *Shipley, &c. v. Mechanics Bank*, 10 Johns. (N. Y.) R. 484.

³ *Sargent et al. v. Franklin Ins. Co.* 8 Pick. (Mass.) R.; and see also, *Bates v. New York Ins. Co.* 3 Johns. Cases, 238, and the authorities cited in the chapter relating to the transfer of shares.

⁴ 1 Kyd, 225; Bac. Abr. Corpor. E. 2, 5.

⁵ 1 Chitty on Plead. 68.

no solid ground for a distinction between contracts and torts. Indeed, say the court, with respect to torts, the opinion of the courts seems to have been more uniform than with respect to contracts ; for it might be shown, that from the earliest times to the present day, corporations have been liable for torts.¹ And it seems clearly, that Lord Ellenborough entertained the same opinion.²

An action on the case will lie against a corporation for a neglect of a corporate duty, as for not repairing a creek which they were bound to do.³ So in an action against the Susquehannah Turnpike Company, for the value of a horse killed by the fall of a bridge on the road, it was held, that the defendants were liable in an action on the case, as they had not used ordinary care and diligence in the construction of their bridges.⁴ So also an action was maintained in Massachusetts against a canal company for damage suffered by the plaintiff, in consequence of the locks not being kept in repair.⁵ So also in Pennsylvania, in an action of trespass on the case for stopping a watercourse, where the defendants were incorporated as a turnpike company, and who caused the water of a rivulet to overflow the plaintiff's tanyard ; it was held that the action would lie, and that the defendants were guilty of a wrong.⁶ In this action it was strongly objected, that

¹ Chestnut Hill, &c. Turnp. Co. in error, v. Rutter, 4 S. & Rawle, (Penn.) R. 6. In this case much learning will be found on the subject, and many references to the Year Books, and other ancient as well as modern authorities.

² Yarborough v. Bank of England, 16 East, 6.

³ Mayor of Lynn v. Turner, Cowp. 86.

⁴ Townsend v. Susquehannah Turnp. Co. 6 Johns. (N. Y.) R. 90. But it must be a clear case of negligence ; and if it is only for a breach of public duty, an indictment is the proper remedy. Harris v. Baker, 4 Maul. & S. 27. And an action on the case will not lie against the *inspectors of an election*, for refusing the vote of a person legally qualified to vote, without proving malice express or implied. Jenkins v. Waldron, 11 Johns. (N. Y.) R. 114.

⁵ Riddle v. The Proprietors of Locks, &c., 7 Mass. R. 169.

⁶ Chestnut Hill, &c. Turnp. Co. v. Rutter, in Error, 4 S. & Rawle, (Penn.) R. 6.

a corporation could not be guilty of a tort ; but Tilghman, C. J., said that this doctrine was fallacious in principle and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies ; for a turnpike company might do great injury, by means of laborers having no property to answer the damages recovered against them.¹

It was fully established in the case where the Bank of England was the defendant, that *trover* will lie against a corporation. In this case the bank was declared against in an action of trover, for three promissory notes of the bank payable on demand for £100 each, describing them by their dates and numbers. After a verdict for the plaintiff before Lord Ellenborough, C. J., at Guildhall, it was moved to arrest the judgment, on the ground that the action, being founded in tort, did not lie against a corporation. But his lordship was of opinion, that wherever a corporate body can competently do, or order any act to be done on their behalf, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others, and the action was sustained in this case.² Consequently, if A. puts a note into the bank and wishes to get it out, and the bank refuse to deliver it, the bank may be sued in an action of trover.

A corporation, by modern decisions in England, is liable in a case for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service.³ But a municipal cor-

¹ A corporation having the return of writs, or to which any writ, on a mandamus, for instance, is directed, is liable eventually to an action for a false return. The case of *Argent v. The Dean and Chapter of St. Pauls*, (the case was referred to by Buller, J., in 2 T. R. 16,) was an action for a false return to a mandamus respecting an election to a verger's place in that cathedral ; and no objection was made that the action would not lie. See also the cases cited in *Yarborough v. Bank of England*, 16 East, 6 ; and see *Burdick v. Champlain Glass Co.*, 11 Vermont R. 19 ; *Hamilton County v. Cincinnati, &c. Turnp. Co.*, 6 Wright, (Ohio) R. 603 ; *Fletcher v. Auburn Rail Road Co.*, 25 Wend. (N. Y.) R. 482 ; *Savage Man. Co. v. Armstrong*, 17 Maine R. 34.

² *Yarborough v. Bank of England*, 16 East, 6. And the same point is confirmed by the case of *Duncan v. Surrey Canal*, 3 Starkie, R. 50.

³ *Smith, &c. v. Birmingham, &c. Gas Light Co.*, 1 Adol. & Ellis, 526 ;

poration is not liable for the misfeasance or nonfeasance of one of its officers, in respect to a duty specifically imposed by statute on the officer. But otherwise, if the duty be imposed absolutely on the corporation as such.¹

It has been laid down as a general rule, that an action of *trespass* cannot be maintained against a corporation aggregate, and the technical reason given is, that a *capias* and *exigent* do not lie against a body corporate, which is the proper process in an action of trespass. But that if any of the members or servants of the corporation commit a trespass in asserting the right of the corporation, the action must be brought against *them* individually, and they may justify in right of the corporation.² It would seem, however, to be now the better opinion, both in England and in this country, that a corporation may be sued in an action of trespass, for a trespass committed by its authorized agents.³ But as we are not aware that that point has ever been expressly decided in any modern case, it may be proper to consider fully what authorities there are which relate to the subject.

It would appear, that, both by the civil and canon law, corporations might be proceeded against and punished for offences, as well as natural individuals, if the offence was committed *communicato consilio*. That is to say, a corporation might be punished for any wrong done by any member, if the wrong was suffered or ratified by the corporate body; and the instance given is, if a member of a corporation ousts a man of his castle, and the corporation retain the possession of such castle to its own use.⁴ For that which is done by the member, is deemed to be the act of the whole, when the whole body is apprised of it and permits it; provided it is not a high public misdemeanor.⁵ The subject

and 28 Eng. Com. Law R. 140. See also, in this country, *Ware v. Barrataria*, 5 Louisiana R. 160; *Pontchartrain Rail Road Co. v. Paulding*, *Ib.* 41.

¹ *Martin v. Mayor, &c. of Brooklyn*, 1 Hill, (N. Y.) R. 545.

² *Bro. Corpor.* 43; 1 Kyd, 223.

³ *Yarborough, &c. supra*; *Chestnut Hill, &c. Turnp. Co. v. Rutter*, in error, 4 S. & Rawle, (Penn.) R. 16; *Gray v. Portland Bank*, 8 Mass. R. 364.

⁴ Code b. 4, t. 28, § 7; Dig. b. 17, t. 1.

⁵ *Ayliffe, Civil Law*, 200.

seems to have been viewed very much in the same light in ancient times in England ; and there are several cases in the Year Books, of actions of trespass brought against a mayor and commonalty, in which, though many objections were taken on other points, none appears to have been taken to the action itself. Thus in an action of trespass against a mayor and commonalty, and a private person (a member of the corporation) jointly ; in which the plaintiff declared on a right of exemption from toll, and alleged that the mayor and bailiffs and the individual had distrained certain beasts from the toll ; much was said on the impropriety of joining the individual in an action against the corporation ; but no question was made whether such an action could be maintained or not against the corporation simply.¹ So also in an action of trespass against the mayor and commonalty of York ; and it was pleaded, that all the inhabitants had a right of common in the land, where the trespass was supposed to have been committed. The plea was held not good, because the action was against the *corporation* and the plea was a justification as to *individuals*. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass *without writing*, which shows, that it was considered that a warrant might be given in writing, which would have been sufficient for the plaintiff's purpose. So also where the archbishop of York brought an action of trespass against the mayor, &c. of Kingston upon Hull and a private person, in which he alleged that he and all his predecessors, from time immemorial, had enjoyed the franchise of having all deodands and other profits in the water of Hull, and that the defendants had disturbed him in taking the said profits ; the private person pleaded in abatement of the writ, that he was named with the mayor and commonalty ; in support of which it was contended that there ought to have been several actions, because the process was several, being *capias* and *exigent* against the individual, and *distringas* against the mayor and commonalty. The mayor and commonalty alleged, that they held the town at farm of the king, by a charter which they produced, and said that the water was

¹ 8 Hen. 6, 1 ; 9 Hen. 6, 36.

parcel of the town, and that they had so held it immemorially, &c. ; but it was not objected, that such an action would not lie against the corporation.¹

Lord Ellenborough thought, that the statute 9 Hen. 4, c. 5, reciting the practice, in assizes of novel disseizin and other pleas of land, of naming the mayor and commonalty, as disseizors, plainly proves, that corporations may be considered as disseizors.² And in Massachusetts, a writ of entry *sur disseizin* was brought against an incorporated company, and no exception was taken that the defendants were incorporated.³

When we consider the above authorities, ancient and modern, as to the liability of corporations to be sued ; and when we also consider, that it is the policy of the present day, especially in the United States, to attach to them the same liabilities to which natural persons are subject, there can be no doubt, that they are subject, generally speaking, to the same liability to be sued, as any common individual.⁴ Thus, in a very late case, it is said by Marshall, C. J., " that money corporations, or those carrying on business for themselves, are liable for torts, is well settled ; and he makes no distinction.⁵ And also in the case of *Sutton v. Bank of England*,⁶ Abbott, C. J., said, that the bank of England, although one of the greatest mercantile communities in the world, was in no different situation from private individuals or private bankers, but was equally responsible for its acts. But trespass will not lie against a railroad corporation for an injury done to the plaintiff by their locomotive steam engine, whether such injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by command or with the assent of the defendants : *case* being the proper remedy.⁷

¹ 45 Ed. 3, 23.

² *Yarborough v. Bank of England*, 16 East, 8.

³ *Doane v. Broad St. Association*, 6 Mass. R. 332.

⁴ See *Bushel v. Commonwealth Ins. Co.* 15 Serg. & Rawle, (Penn.) R. 173.

⁵ *Fowle v. Common Council of Alexandria*, 3 Peters, R. 409.

⁶ *Ryan & Moody*, 52.

⁷ *Phila. &c. Rail Road Co. v. Wilt*, 4 Whart. (Penn.) R. 143. See also

The corporation may be sued by one of their own members. This point came directly before the court in the State of South Carolina, in an action of *assumpsit* against the *Catawba Company*. The plea in abatement was, that the plaintiff was himself a member of that company, and therefore could maintain no action against it in his individual capacity. The court, after hearing the argument, overruled the plea, as containing principles subversive of justice; and they moreover said that the point had been settled by two former cases, wherein certain officers were allowed to maintain actions for their salaries due from the company.¹

§ 11. It was expressly decided in the year 1806, in Massachusetts, that an aggregate corporation cannot be summoned as trustee under the statute of February 28, 1795.²

The action was *assumpsit*, in which the plaintiffs set forth their charter of incorporation from the State of New York, sundry as-

Carmichael &c. v. Trustees &c., 3 Howard. (Miss.) R. 84, where the action was maintained in case of a land boundary.

¹ *Waring v. Catawba Co.* 2 Bays, (S. C.) R. 109.

² *Union Turnpike Road v. New England Marine Ins. Co.* 2 Mass. R. 37. In the year 1781, in the State of Pennsylvania, in the Court of Common Pleas, (Philadelphia county) a foreign attachment was issued against the commonwealth of Virginia; and a quantity of clothing, imported from France, belonging to the latter State, was attached in Philadelphia. The delegates in congress from Virginia, conceiving this to be a violation of the laws of nations, applied to the supreme executive council of Pennsylvania, by whom the sheriff was ordered to give up the goods. The plaintiff's counsel, finding that the sheriff had made no return of his proceedings, obtained a rule that the sheriff should return the writ, unless cause was shown. The attorney general, on the part of the sheriff, and by direction of the supreme executive council, showed cause and prayed that the rule might be discharged. He contended, (not that the State of Virginia, being a corporation, was not liable to foreign attachment,) but, that every kind of process, issued against a sovereign, is a violation of the laws of nations, and is in itself null and void; and also, that a sheriff cannot be compelled to serve or return a void writ. After the matter had been held under advisement by the court for some days, the president delivered it as the judgment of the court, "That the rule, made upon the sheriff to return the writ issued against the commonwealth of Virginia, should be discharged." *Nathan v. Commonwealth of Virginia*, 1 Dallas, 77, note.

sessments, made in pursuance of the charter upon the stockholders, of which the defendant was one, and his undertaking and promise to pay the amount of those assessments. The New England Marine Insurance Company were summoned as *trustees* of the defendant, by a service on Peleg Coffin Esq., then their president.

The defendant pleaded to the jurisdiction of the court below, that the cause of action, if any, accrued at Hudson within the jurisdiction of the State of New York ; that at the time when this suit was commenced, and long before and ever since, the said T. J. was and still is a citizen of the State of New York, and resident therein, and has never within three years before suing out the original writ been an inhabitant of, or resident in this commonwealth ; that the corporation named as plaintiffs was created by the statute of New York, and has existed there only, and that all the members thereof were, and still are citizens of and resident in the State of New York, and did never live within this commonwealth ; that he, the said T. J., had no estate, goods, effects, or credits within this commonwealth, liable to attachment ; and that no estate, goods, effects, or credits of his were attached by the original writ in this action.

The plaintiffs reply, that the New England Marine Insurance Company, a corporation erected within this commonwealth, had and still have in their hands, effects and credits of the said T. J. to the amount of 5000 dollars, which were attached in this action, and traverses that he had not any such effects, &c., and that none such were attached, &c.

The defendant rejoins, that the effects and credits so attached are the property of the said T. J. and one T. J. jun. jointly ; and that no part of them are the sole property of the defendant.

To which the plaintiffs demur, and the defendant joins in demurrer.

The question made in this action was, whether the property attached in the hands of the New England Insurance Company can be held to respond the judgment which the plaintiffs may obtain, or in other words, whether a corporation aggregate may be summoned as trustee under the statute of this commonwealth, passed

Feb. 28, 1795, entitled, "An act to enable creditors to receive their just demands out of the goods, effects, and credits of their debtors, when the same cannot be attached by the ordinary process of law."

For the plaintiffs it was argued, that the great and leading object of this statute was to prevent debtors from concealing their effects, or putting them out of the reach of legal process. That this object, so desirable, would be in a great measure defeated, if it was once settled, that credits in the hands of corporate bodies were safe from attachment. That as the officers of every corporation of this kind have the sole management of their affairs, keep all their accounts, and are perfectly acquainted with all the facts respecting the debts and credits of those with whom the company transact business, the useful and salutary purposes of the statute would be fulfilled by permitting those officers to come in and make answer upon their oaths, in behalf of the company to the interrogatories. That this has, in fact, been frequently practised without opposition; and two or three cases were named wherein it had been done.

The court, without hearing the defendant's counsel, were unanimously of opinion, that an aggregate corporation cannot be summoned as trustee, and that effects and credits, in the hands of such a corporation, cannot be attached under the statute.

§ 12. It has been thought, that if a corporation can sue within a foreign jurisdiction, (as we have fully shown it can,) there is no reason why it should not be liable to be sued without its jurisdiction in the same manner, and under the same regulations as domestic corporations.¹ The technical difficulty, which is said to stand in the way, is, that the process against a corporation, must, by the common law be served on its head or principal officer, within the jurisdiction of the sovereignty, where this artificial body exists. But if a foreign corporation (for instance, an insurance company in Boston) should establish its president in New-York, for the express purpose of making contracts there, and

¹ *Bushel v. Commonwealth Ins. Co.* 15 S. & R. (Penn.) R. 176.

should also have property there, it would seem very strange, if the president could not be summoned there to answer to a debt contracted by him in the corporate name ; and that a *distringas* could not be allowed to issue against the corporate property. And Rogers, J., who gave the opinion of the court in a case in the Supreme Court of Pennsylvania, very strongly intimates, that under such circumstances, a corporation, created by the laws of one State, might be sued in the manner we have mentioned in another.¹ Indeed, there is no substantial and satisfactory reason, why the technical rules of the common law respecting suits against corporations should not, like many other rules respecting them, be so far made to yield, as to correspond with the present state of things, and to accomplish the ends of justice, by making the property of an absent corporation liable to be attached in the same manner, as the property of any other absent debtor. In taking this view of the subject, we are supported by a case in the Supreme Court of Pennsylvania, wherein it was held expressly by a majority of the court, that the property of a Massachusetts corporation might be attached under the foreign attachment law of Pennsylvania, as the property of an absent *person*.² This case turned upon the construction of that section of the act of Pennsylvania respecting foreign attachment, which grants the writ of attachment against the effects of any *person* or *persons*, who are not residing within the State, &c. The opinion of the court was given by Rogers, J., who, after referring to the great number of corporations, their continual increase, the extent of their operations, the establishment of agents in foreign states, for the express purpose of making contracts ; and after referring also to the consequent difficulty of conceiving a valid reason, why foreign

¹ Ibid. Mr. Tidd says, "In proceeding against a corporation, the process should be served on the mayor or other head officer ; and if the defendants do not appear before or on the *quarto die post* of the return of the original, the next process is a *distringas*, which should go against them in their public capacity ; and under this process may be distrained the lands and goods, which constitute the common stock of the corporation." — 1 Tidd's Practice, 116.

² *Bushel v. Commonwealth Ins. C. supra.*

corporations should be exempted from the operation of laws, which regulate the contracts of individuals and domestic corporations, observed as follows, "Are foreign corporations within the spirit of the act? We are so to construe the act, as to suppress the mischief and advance the remedy. The mischief which the legislature intended to remedy was, that the effects of persons artificial or natural, who were *absent*, were not equally liable with those of persons artificial or natural, dwelling upon the spot, to make restitution for debts contracted, or owing within the province. Foreign corporations and foreign individuals were placed on a better footing before the passage of the act, than domestic corporations or citizens of the State; for remedy whereof, the act in question was passed, enabling the court to compel an appearance by attachment of their effects within the State.

"It may be here proper to remark, that the act has been already construed to extend to persons, who have never been within the State; it has therefore the same application to corporations which are stationary, as to natural persons. Foreign corporations, it is true, are necessarily absent from the State, but may have effects within it, and may contract and owe debts to citizens of this State, which they may be unable or unwilling to pay.

"It is no answer to say, that this is a mere question of remedy; that the corporation may be sued in Massachusetts, as in this case, or in Europe, or Canton, as the case may be.

"But suppose suit should be commenced within a foreign jurisdiction, judgment obtained, and execution issued, and the company should prove insolvent, (and daily experience shows us, that this is no improbable supposition,) what would be the remedy against their effects within this State? Relief must depend entirely on the laws of the foreign government. If there was a power in their courts to compel an assignment, or to sequester their property, in and out of the State, there might be some remedy, however inadequate, to the creditor. I cannot bring myself to believe, that the legislature ever intended, that citizens of Pennsylvania, who had the property within their grasp, or a lien upon it, should be deprived of that lien, and depend for the payment

of their debts on the laws of a sister State, or of a foreign government; and the more especially am I unwilling to adopt that construction at this time, when this contract was made, and contracts are daily making by foreign corporations, within the limits of this State, and under the jurisdiction of this court. If this were a case of doubtful construction, the argument *ab inconvenienti* would be exceedingly strong, and would go far with me, in the determination of the case.

“But it is said, that corporations are not within the act, because it is provided, ‘That, if the plaintiff in the attachment obtain a verdict, judgment, and execution, for the money and goods, in the garnishee’s possession, yet the defendant in the attachment *may*, at any time before the money be paid, *put in bail to the plaintiff’s action*, upon which the attachment is grounded, whereby the garnishee will and shall be immediately discharged.’

“Granting, merely for the sake of the argument, that ‘bail to the plaintiff’s action,’ as used in the act of assembly, means special bail only, and agreeing, as I certainly do, that a corporation cannot enter special bail, yet it by no means follows, that the effects of foreign corporations cannot be attached, under the act of 1705.

“This point has undergone a judicial investigation, in the case of *Carpentier v. The Delaware Insurance Company*, 2 Binn. 264. It was there contended, that the plaintiff could not enter a rule of reference, because the defendants were a corporation. That in every case intended to be referred an appeal was given; but that in no case could it be obtained by the defendant, without entering into a recognizance conditioned to pay the debt and costs, or to surrender him to jail. That a corporation could not give such a recognizance, because it could not be surrendered.

“From this it was inferred, that corporations defendants were not within the act, in the same manner, and by the same arguments as it is here contended, that corporations are not within the act of 1705, because bail to the plaintiff’s action means special bail, and that they cannot enter such bail. The court, however,

decided, that the plaintiffs were not prevented from entering a rule of reference, which in effect decided the principal point in this case. If bodies corporate, say the court, are not within the law, it must be because there is something in their nature inconsistent with its provisions ; for they are *not expressly excepted*. It is contended, they must be excepted by implication, because they are excluded from the benefit of an appeal, which is given on condition incompatible with the nature of a corporation. It is clear, says the Chief Justice, that one of the alternatives of this condition is not applicable to a corporation, which is not a natural, but a political body, incapable of being surrendered or imprisoned. I agree that the form of the recognizance is not applicable to a body corporate, but from this I draw a different conclusion from them. I do not infer that the defendant can have no appeal, but that they may have an appeal without entering into any recognizance.

“ In this case, I do not infer that the effects of foreign corporations cannot be attached, but should infer, were it not for considerations which I shall state, that the attachment should be dissolved by entering an appearance without bail.”

From this opinion Duncan, J., dissented,¹ and in giving his

¹ He did not view the question as one of so much magnitude as had been represented, or consider that such serious mischiefs would arise from deciding, that the effects of a corporation created by a sister State cannot be attached. As to the argument *ab inconvenienti*, he remarked ; “ Inconvenient it may be to the party entering into a contract with a foreign corporation, to be obliged to apply to the forum of another State for justice ; but the man who contracts with a foreign corporation takes his risk of that, and judges for himself, whether that inconvenience is, or is not, counter-balanced by the lesser premium, and contracts accordingly, as in his judgment the scales of advantage or inconvenience preponderate.” But he mentioned this, “ not because he thought courts ought to be governed by considerations of this kind, where a law is plain, and the uniform construction has prevailed for more than a century.” As to whether a corporation was a “ person,” within the meaning of the act relative to foreign attachment, he observed that, in his humble judgment, there was a demonstration in the act itself, that natural persons were alone intended and alone comprehended. The legislature, he said, intended to give to all debtors, whom they subjected to foreign attachment, the right to dissolve it on entering *special bail*, which

reasons for so doing, he placed much stress upon the case of *M'Quin v. The Middletown Manufacturing Company* in the State of New York ;¹ a case in which it was held, that the attachment law of New York only contemplated the case of a liability to arrest. To state the case more fully, it appears that an attachment had issued against the estate of a corporation established in Connecticut ; and the attachment, it was contended might issue in such a case, under the 23d sec. of the act of the State, which section enacts, that the real and personal estate of every debtor who resides out of the State, and is indebted within it, shall be liable to be attached, and sold for the payment of his debts, in like manner, in all respects, as the estates of debtors residing within the State. The construction the court gave to this clause, from a view of the whole act, was, that the legislature intended to authorize proceedings under it against natural persons only. Spencer, J., who gave the opinion of the court observed ; “ We think, a foreign corporation never could be sued here. The process against a corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here ; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character ; and though, possibly, it would be competent for a foreign corporation to constitute an attorney to appear, and plead to an action instituted under another jurisdiction, we are clearly of the opinion, that the legislature contemplated the case of liability to arrest, but for the circumstance, that the debtor was without the jurisdiction of the process of the courts of this State ; and that the act, in all its provisions, meant, that attachments should go against natural, not artificial, or mere legal entities. The first section speaks

corporations could not give, because it would not be taken : That the debtor corporation was not such an entity as could enter special bail : That it could not be arrested, because invisible : That it could not be delivered in bail, because it could not be in custody, or surrendered.

¹ *M'Quin v. Middletown Manuf. Company*, 16 Johns. (N. Y.) R. 6.

of persons, and throughout the act, natural persons only were intended to be subjected to its provisions.

“It is true, that there are cases in which corporate property has been held liable to be taxed, under acts which subject the property of *inhabitants* to taxation ; but in all such cases, the tax operated *in rem*, on the estate ; and it has been held, that whoever resided on the property, represented, in that respect, the corporation, and in the view of the act were inhabitants ; but it would not be correct to say, abstractly, that a corporation, or mere legal entity, was an inhabitant.”

§ 13. We have already seen, that in suits where a corporation is a party, the constitution and laws of the United States, in reference to the question of jurisdiction, look to the parties to the suit.¹ In the case of the Hope Insurance Company *v.* Boardman, in which the corporation was defendant in the court below, and was described simply as a body incorporated by an act of Assembly of the State of Rhode Island, and established at Providence in the State of Rhode Island, (the corporation being composed of citizens of the State in which the suit was brought,) the decision of the Supreme Court of the United States was against the jurisdiction of the Circuit Court, upon the ground, that the right of a corporation to litigate in the courts of the United States depends on the *citizen character* of the members composing the corporation.²

In the Circuit Court of the United States held in Pennsylvania, the following case came before the late learned Mr. Justice Wash-

¹ Ante, p. 318.

² Hope Insurance Company *v.* Boardman, 5 Cranch, 57. It has been repeatedly decided by the Supreme Court of the United States, that when there is a joint interest in all the individuals, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction ; and that even in a case where the parties might elect to sue jointly or separately, if they nevertheless sue jointly, the case is not distinguishable from one where they are compelled to unite. New Orleans *v.* Winter, 1 Wheat. R. 95 ; Cameron *v.* M'Roberts, 3 Wheat. R. 591 ; Strawbridge *v.* Curtis, 3 Cranch, 267.

ington, in the year 1826. A bill in equity was brought by a citizen of New Jersey against certain individuals, citizens of Pennsylvania, and an incorporated company under the name of the "Lehigh Coal and Navigation Company," praying discovery and relief against each. To this bill the defendants put in joint and several plea to the jurisdiction of the court, alleging that four persons — naming them — members of the said company were at the time of filing the bill, and of issuing the subpoena, and now are, citizens of the state of New Jersey, and residing therein. In the argument of the cause by the plaintiff's counsel, it was contended, that in a suit in equity it is always deemed sufficient to bring the substantial parties, or those concerned in interest, before the court; and that the omission, or introduction, of parties merely formal, could not affect the jurisdiction of the court, or afford a ground of objection as to parties. The Judge thought that the material question to be decided was, who are the parties to the suit, in a case where a *corporate body* sues or is sued in *its corporate name*? If the controversy, he said, was in fact and in law, between the individual corporators of the before mentioned company, appearing in court by their corporate name, and the plaintiff; it followed that the four members of that corporation, who are citizens of the state of New Jersey, are, and from necessity must be, parties defendants in the suit; since every member of the company is represented by the corporate name under which it is sued. The whole of the argument then, he said, which was urged by the plaintiff's counsel, as to omitting parties who are without the jurisdiction of the court, or where the parties being very numerous, a part of them may sue or defend for the whole, (although perfectly sound,) was manifestly without force, when applied to the case of a suit brought by or against a corporate body; because in such a case it is not at the option of the plaintiff to omit any of the members of the body, nor could the court consider them otherwise than as parties to the suit. In short, the learned Judge deemed it impossible to extricate the case before him from the principles, so clearly and so positively established in the case of the Hope Insurance Company, to which

we have just referred, and in the case of the Bank of the United States *v.* Deveau.¹

It would be improper to dismiss the case we have just been considering, without calling the reader's attention to the observations with which the learned Judge concluded his opinion. They are as follows ; " We very truly regret that the authorities, and the course of reasoning which has been stated, lead us inevitably to the conclusion, that the jurisdiction cannot be sustained in this case against the Lehigh Coal and Navigation Company ; and we freely acknowledge, that we have struggled, as far as duty would sanction, to discover such reasons as we could safely and conscientiously abide by, to authorize us in coming to a different conclusion. Our duty is to follow where the rules of law or equity, and right reason lead, without looking to consequences ; although from a view of those consequences, we may be permitted, as we have done, to express our regret that the law is as we have stated

¹ See ante, p. 318. The Judge made the following distinction between suits by or against corporations, and suits by and against voluntary associations ; " The members of a voluntary association, trustees, partners, &c., are individually parties to the controversy, each one appearing in *propria persona*, and representing himself for the purpose of litigating some matter, in which he is interested, either in law or equity. The claim by or against them is several, or joint and several. The parties, if there be more than one, are easily separable ; and since the general rule of the court of equity, as to parties, is established with an eye to the convenient administration of justice, that court allows, and can do so, without injustice or absurdity, an exception to that rule, where one of the parties is without the jurisdiction of the court, and a decree can be made without injury to him, against the parties who are within the jurisdiction ; or where, from the number of parties, it is impracticable to bring the whole before the court, by permitting some of them to bring, or defend, the suit for themselves, and for those who are omitted. But in all these cases it is essential to allege in the bill those facts, which entitle the plaintiff to claim the benefit of the exception. Very different is the case of a corporation. The members of it, though in reality the parties to the controversy do not, and cannot, appear to prosecute or defend in person. They do not represent themselves, but they are represented by the corporate name ; which name includes all the members, and can admit of no omission, or exclusion, for the reasons above stated, or for any other."

it, or apprehended it to be. For it is very certain, that if we are correct in our view of it, very few corporations can enjoy the privilege of suing, or being sued, in the courts of the United States, where a plea similar to the present is interposed ; since it can seldom happen, we presume, but that some of their members reside in other States, than that in which the business of the corporate body is transacted, and in which the suit is brought. *Whether Congress can or will, by legislative provisions, secure to corporations the privilege of suing, and to others that of suing them in the courts of the nation, in cases where some of the corporators are citizens of a State or States, other than that in which the suit is brought, rests with that body in its wisdom to decide.*¹

In a suit on a policy of insurance underwritten by the defendants, (a corporation established in Connecticut, and composed of citizens of that State,) by which the plaintiff (a citizen of New Hampshire) was insured \$3000 on his house against losses by fire ; a question arose at the bar upon a motion to dismiss the suit for want of jurisdiction, the defendants not being a corporation in the State where the suit was brought. The act of 1789, ch. 20, § 11, was cited in support of the motion, which was made after the defendants had entered a general appearance. Story J. : The same section (§ 11.) goes on to provide, that no *civil* suits shall be brought before the Circuit Court “against any *inhabitant* of the United States by any original process in any other district, than that whereof he is an inhabitant, or in which he shall be found at the time of the serving of the writ.” Upon this principle, there may perhaps be difficulty in averring, that the present corporation has any inhabitancy or commorancy at all. But it is averred in the writ, that it is composed of citizens of Connecticut, and of course of persons having an inhabitancy there. The objection would therefore be fatal, if it had been interposed in the first instance. But it has been uniformly held, that this clause does not *per se* oust the jurisdiction, but is a privilege given to the defendant, of which he may avail himself at a proper time, or which he may waive at his pleasure. The entering an appear-

¹ Kirkpatrick v. Lehigh Coal and Navigation Co. 4 Wash. C. C. R. 595.

ance generally has been held to be a waiver of it, and an admission of a due and effectual service to compel the party to answer. In the present case a general appearance has been entered, and steps taken towards the trial of the cause, as a cause rightfully in court. I think, therefore, the motion must be overruled.”¹

¹ Motion overruled accordingly. *Flanders v. Etna Ins. Co.* 3 *Mason, C. C. R.* 158.

CHAPTER XII.

OF DISFRANCHISEMENT AND AMOTION OF MEMBERS AND OFFICERS.

§ 1. A DISTINCTION is made (and one which has not at all times been sufficiently regarded) by Mr. Willcock, in his treatise on municipal corporations, between disfranchisement and amotion.¹ Disfranchisement is applicable only to the rights of a member of a corporation, as such ; for every member of a corporation, as it has been said by Blackstone, is understood to have a “ franchise, or freedom ; ”² and, therefore, when the member is deprived of this franchise or freedom by being expelled, it may very properly be said, that he is disfranchised. Disfranchisement applies to *members*, but amotion only to *officers* ; and consequently, if an officer be removed for good cause, he may still continue to be a member of the corporation. Misconduct in a corporate office warrants only an amotion from that particular office, in which the person has miscondacted himself, and, as is obvious, may not always justify an exclusion from the freedom, or the incidental rights of membership.

§ 2. It was resolved in Bagg’s case, that no freeman of any corporation could be disfranchised by the corporation, unless they had authority, either by the express words of the charter, or by prescription.³ The arguments in this case, though they were in general more applicable to disfranchisement, yet the particular case was of amotion from office. The position just mentioned, however, as to the power of a corporation to disfranchise a member has never been (though by many supposed to have

¹ Willcock on Mun. Corpor. 270.

² See Ante, Introduction, p. 3.

³ Bagg’s case, 11 Co. 99.

been) expressly overruled in England ; and in the cases of Lord Bruce,¹ *Rex v. Richardson*,² and others, the questions were questions of amotion. Mr. Willcock considers, that some of the remarks of Sir E. Coke on this subject, in Bagg's case, are worthy of considerable attention.³

With regard to what are called joint stock incorporated companies, or indeed any corporations owning property, it cannot be pretended, that a member can be expelled, and thus deprived of his interest in the stock or general fund, in any case, by a majority of the corporators, unless such power has been expressly conferred by the charter. And if an owner of stock could be excluded, without any provision in the charter, from participating in the election of officers, and other affairs of the company, he would still be entitled to the amount of his stock, and could recover it

¹ Lord Bruce's case, 2 Str. 820.

² *Rex v. Richardson*, 1 Burr. 525.

³ Willcock on Mun. Corpor. 271. At the time when James Bagg's case was before the court, their attention had been rarely attracted to the consideration of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement. But there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honorable distinction, which he holds for the welfare of the corporation, and therefore, although it be an office of a freehold nature, it is entirely conditional; in the first place, depending on the particular regulations of the constitution, such as residence, &c.; secondly, upon his discharge of those duties which belong to the office, neglect of which is cause of amotion; thirdly, on his being such a person as ought to be permitted to hold office, and therefore defeated by commission of any infamous offence, although not relating to the corporation. But the franchise of a freeman is wholly for his own benefit, and a private right; a right in the municipality similar to that of a natural subject in the state, of which he ought not to be deprived for any minor offence against his corporate fealty, than that for which, as a subject, he ought to be deprived of his franchise as a liegeman. For this reason all minor corporate offences, such as improper behavior to his fellow-corporators, where not punishable by the general law of the land, as well as violations of his corporate duties, ought to be punished by penalties imposed by the ordinances of the municipality, and not by disfranchisement. *Ibid.* 271, 272.

in an action against the corporation. It will be shown in a subsequent chapter, that transferable shares in the stock of any company cannot be divested out of the proprietor by any act of the company, without the authority of the stockholder.¹

In the case of the Bank of England, the court say ; " The legislature, so far from allowing an act of the Bank to deprive the stockholder of his interest, has taken care to direct in what manner the interest he has shall be conveyed away."² As in banks, insurance, canal, turnpike companies, &c. a person is made a member by the purchase of stock,³ so he of course ceases to be a member by making a transfer of his stock ; for by such transfer he disqualifies himself to be a member. It would certainly seem to be a reasonable rule, with regard to the expulsion or removal of members of corporations generally, that when a member disqualifies himself to assist in promoting the object and purposes of the corporation, he forfeits his corporate franchise, and may thus justify a vote of expulsion. For example, if a member of a corporation, created for the advancement of religion, should conduct himself in such a manner as to counteract the efforts of the other members in effecting that object, the corporation might be authorized to disfranchise or expel him. It is, no doubt, a tacit condition annexed to the franchise of a member, that he will not oppose or injure the interest of the corporate body ; and consequently, if he breaks this condition, he may be disfranchised.⁴ In *Bagg's* case it was resolved, that the cause of disfranchisement should be grounded upon an act, which is against the duty of a citizen or burgess, and to the prejudice of the public good, of the city or borough, and against his oath which he took when he was sworn a freeman, for it is a condition of law tacitly annexed to his freedom or liberty. A mere attempt, however, to do such an act, unattended with an eventual injury, is not a sufficient

¹ See post, Chapter relating to Transfer of Stock.

² *Davis v. Bank of England*, 2 Bing. 393 ; *State v. Tudor*, 5 Day, (Conn.) R. 329 ; *Delacy v. Neuse River Nav. Co.* 1 Hawks, (N. C.) R. 520 ; *Ebaugh v. Herdel*, 5 Watts. (Penn.) R. 43.

³ See Ante, p. 69, 70.

⁴ *Commonwealth v. St. Patrick Society*, 2 Binn. (Penn.) R. 448.

cause, for a freeman has a freehold in the franchise for his life. The law, as it has been laid down by the Supreme Court of Pennsylvania is, that a corporation possesses inherently the power of expelling members in *certain cases*, as such power is necessary to the good order and government of corporate bodies ; and that the cases in which this inherent power may be exercised are of three kinds. 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature, as renders him unfit for the society of honest men ; such are the offences of perjury, forgery, &c. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offence is against his *duty as a corporator* ; in which case he may be expelled on trial and conviction by the corporation. 3. The third is an offence of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.¹ But these principles, as before suggested, of course cannot be considered applicable to corporations the members of which are stockholders. And where the visitatorial power is vested in trustees, in virtue of their incorporation, there can be no removal of them ; though they are subject, as managers of the revenues of the corporation, to the superintending power of chancery, which (without comprehending a visitatorial authority, or a right to control the charity) includes a general jurisdiction in all cases of an abuse of trusts, to redress grievances and suppress frauds. Indeed, where a corporation is a mere trustee of a charity, a court of equity will go yet further ; and though it cannot appoint or remove a corporator, it will, in a case of gross fraud or abuse of trust, take the trust from the corporation, and vest it in other hands.² In the American books there are very few cases to be found on this subject of disfranchisement ; and the cases in the English books which we

¹ Commonwealth v. St. Patrick Society, 2 Binney, (Penn) R. 446 ; and see the opinion of Lord Mansfield, in Rex v. Richardson, 2 Burr. 536.

² Dartmouth College v. Woodward, 6 Wheat. R. 676, 688. Society for the Propagation of the Gospel v. New Haven, 8 Wheat. R. 464 ; Fuller v. Plainfield Academic School, 6 Conn. R. 532.

have met with, relating to the causes that are sufficient to justify a vote of disfranchisement, are confined to municipal corporations.

We will proceed, however, in endeavoring to show, by such cases directly in point as we are able to find, the limits of the power of disfranchisement, when the charter is silent.

§ 3. As Mr. Willcock observes, few cases have ascertained what is sufficient cause of disfranchisement; those which have been decided on this point are almost all of the negative kind, which only show what causes, being relied upon, were considered insufficient to warrant a disfranchisement.¹ A corporate assembly, being apprehensive of a riot from the violence of the different parties, was dissolved, and some of the members remained, saying that the assembly was not dissolved, and thereupon made divers orders and caused them to be entered in the books. This conduct was held to be sufficient cause for disfranchising those who remained and concurred in such acts; for the irregular entry of such orders was very prejudicial to the corporation, &c.² Being so poor, as to be incapable of paying his scot and lot, was held insufficient to disfranchise a member of a municipal corporation in England; and so was the conviction of an assault, or saying of an alderman that he was a knave. The first is a misfortune, and not an injury to the corporation, as such; and the others are offences punishable at common law upon conviction by a jury, and not fit subjects for the investigation of a corporate body.³ Even a usage in a prescriptive corporation to disfranchise or suspend a freeman, for insulting words to a principal officer of the corporation, was in England held void, though the customs were in general terms conferred by statute.⁴ In the case of the Plain-

¹ Willcock on Mun. Corpor. 273.

² The Protector v. Kingston, Sty. 478, 480.

³ Rex v. Andover, 3 Salk. 229; Jay's case, 1 Vent. 302; Earle's case, Carth. 174 b; Rex v. Oxford, Palm. 455; Rex v. London, 2 Lev. 201; Rex v. Lane, 2 Mod. 270. It was said by Twisden, C. J., that a freeman may be disfranchised for saying of the mayor, that he had burnt the charters of the corporation; but the observation was immaterial to the decision. Jay's case, 1 Vent. 302.

⁴ Rex v. London, 2 Lev. 201; Rex v. Rogers, 2 Lord Ray. 777; Rex v. Guildford, 1 Lev. 162.

field Academy, where the return, by the members of the corporation, to a writ of mandamus, complaining of the removal of a member, and seeking his restoration, alleged, as the grounds of removal, first, disrespectful language towards his associates, secondly, neglect of official duty in not acting on committees ; it was held, that these charges were insufficient to justify a removal. The place of a trustee in an eleemosynary corporation, though no emoluments are attached to it, it was also held, is a franchise of such a nature, that a person improperly dispossessed of it is entitled to redress by writ of mandamus.¹ The mere misemployment of corporate funds is no cause for amotion, but charging the corporation with money, which the member never paid, is sufficient cause for amotion.²

A case was decided in Pennsylvania, in the year 1810, which arose on return to a mandamus directed to the St. Patrick Benevolent Society, an incorporated body, commanding them to restore John Binns to the rights of a member of said society. The question was, whether the by-law under which the expulsion was made was valid, the by-law providing for the dismissal of members for vilifying a corporator. In determining the question, the court considered it necessary to regard the nature of the corporation, which was an association, having for its object the raising of a fund to be applied to the relief of its members, in case of sickness and misfortune, and to the assistance of distressed Irishmen, emigrating to the United States. Each member paid a certain sum, on admittance to the society, and likewise an annual contribution ; and each member was entitled, in case of sickness, or distress occasioned by unavoidable accident, to pecuniary assistance from the funds of the society. The corporation had power to make by-laws for the good order and support of the affairs of the corporation, provided, the said by-laws, were not repugnant to the instrument of incorporation ; and by the charter, any member, who was guilty of insulting or disrespectful behavior to any of the society, should be fined, for the first offence, in the

¹ Fuller v. Plainfield Academic School, 6 Conn. R. 532.

² Commonwealth v. Guardians of the Poor, 6 S. & Rawle, (Penn.) R. 469.

sum of one dollar, double that sum for the second offence, and for the third be expelled the society. Tilghman, C. J., in giving the opinion of the court, after stating that the case provided for in the charter was, from its nature, confined to disrespectful behavior in the presence of the party offended, observed as follows ; “ My opinion will be founded on the great and single point, on which the cause turns. Is this by-law necessary for the good government and support of the affairs of the corporation ? I cannot think that it is. I have considered the case, with a mind strongly disposed to give a liberal construction to the power of making by-laws. It is my wish to give all necessary powers for carrying into effect the benevolent purposes of this society, and many others which have lately been incorporated on similar principles. But these powers must not be constrained, or the societies, instead of being protected, will be dissolved. The right of membership is valuable, and not to be taken away without an authority fairly derived from the charter, or *the nature of corporate bodies*. Every man who becomes a member looks to the charter ; in that he puts his faith, and not in the uncertain will of a majority of the members. The offence of vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation. So far from it, that it appears to me, that taking cognizance of such offences will have the pernicious effect of introducing private feuds into the bosom of the society, and interrupting the transaction of business.” The Chief Justice concluded by saying ; “ On mature reflection it appears to me, that without an express power in the charter, no man can be disfranchised, unless he has been guilty of some offence, which either affects the interests or good government of the corporation, or is indictable by the law of the land. I am therefore of opinion, that the cause returned by the President of the St. Patrick Benevolent Society, for not restoring John Binns to the rights of a member, is insufficient.”¹

When the charter expressly authorizes the expulsion of mem-

¹ Commonwealth v. St. Patrick Society, 2 Binney, (Penn.) R. 441.

bers in certain specific cases, it does not follow that the power of expulsion may not be exercised in other cases, when the good government of the corporation requires it, unless it is positively confined to particular offences.¹ In a case where the articles of a corporation authorized the expulsion of a member for being concerned in scandalous or improper proceedings, which might injure the reputation of the society, it was held to be sufficient cause of expulsion, that a member claiming relief from the society had altered the amount of a physician's bill from four dollars to forty, and had presented the bill to the President as the basis of his claim.²

Where the rules of a religious society inflicted the penalty of expulsion on any member, who should commence a suit at law against another member, "except the case were of such a nature as to require and justify a process at law," a return to a mandamus to restore a member to his standing, which set forth the rule, and also that the expelled member had commenced a suit against another, (without averring that the case was not of such a nature as to require and justify a process at law,) was held to be insufficient.³

§ 4. In none of the above cases, wherein it is considered that there is just and sufficient cause for amotion, can the party be expelled, unless he has been *duly notified* to appear.⁴ And where a corporation strikes off one of its members, without giving previous notice, and affording an opportunity to be heard, a *mandamus* to restore him will be granted.⁵ J. H., a member of the Pennsylvania Beneficial Institution, having been expelled from the society, and having applied to the Supreme Court for a *mandamus* to restore him, the officers of the corporation made a

¹ Ibid. 4 Binney, (Penn.) R. 448.

² Commonwealth v. Philanthropic Society, 5 Binney, (Penn.) R. 486.

³ Green v. African Methodist Episcopal Society, 1 S. & Rawle, (Penn.) R. 254.

⁴ Willcock on Mun. Cor. 264; Fuller v. Plainfield Academic School, 6 Conn. R. 532.

⁵ Delacy v. Neuse Navigation Co., 1 Hawks, (N. C.) R. 274.

return, showing cause why the said J. H. should not be restored to the rights of a member. It appeared by the return, that, by the articles of incorporation, each member was to pay fifty cents in specie, a monthly contribution, and that should any member neglect to pay his contribution for three months, he was to be expelled. J. H., it was stated, was three months in arrear, as was reported by a committee appointed for the purpose of making inquiry on that subject, whereupon he together with others, who were found to be in the like situation, were struck off the roll, as having forfeited their rights of membership in the society. There was no vote of expulsion, because in the opinion of the officers who made the return to the mandamus, the nonpayment of contributions for three months was, *ipso facto*, a forfeiture of membership. But the court were clear, that there must be some act of the society, declaring the expulsion; and that this could not be done without a vote of expulsion, *after notice* to the member supposed to be in default. For it was possible, that the member might either prove, that he was not in arrears, or give such reason for his default as the society might think sufficient.¹ And the notice must be served upon the accused a reasonable time before the amotion; and where an amotion is shown, the notice must be particularly and positively averred; if it be under a recital, as *licet summonitus fuit*, it is insufficient.²

This notice may of course be dispensed with, when the party has appeared at the meeting, and either defended himself, or answered or confessed the charge against him; for this is a waiver of his right to notice.³ If the accused member is present, say the Supreme Court of Pennsylvania, when the subject is taken up, and is willing to enter into the inquiry immediately, there is no occasion for further notice.⁴

¹ Commonwealth v. Pennsylvania Beneficial Institution, 2 S. & Rawle, (Penn.) R. 141.

² Rex v. Richardson, 1 Burr. 540; Rex v. Liverpool, 2 Burr. 731; Bagg's case, 11 Co. 99.

³ Willcock on Mun. Corpor. 265.

⁴ Commonwealth v. Penn. Beneficial Institution, 2 S. & Rawle, (Penn.) R. 141.

It does not appear necessary, that the summons or notice should particularize the charges ; though some intimation should be given of them, that the accused may have an opportunity of vindicating himself.¹ In one case it was said, that there should be a notice of the charge, and that a general summons was not sufficient, when particular offences were alleged, which the accused might not be prepared to answer.² And although, if a notice set forth one charge, and a different one is preferred, the accused may decline answering the new matter, yet in the allegation of the charge technical precision is not required.³ That the member must have an opportunity of answering the charges preferred against him, and making a full defence, fully appears by the case, before cited, of *The Commonwealth v. Pennsylvania Beneficial Institution*, and the authorities therein cited. If the member remain silent and do not deny the charge, it must be examined and proved, and all proceedings must be conducted as though he had denied it ; for an amotion, on pretence that silence amounts to a confession, is void ; though it does not afford sufficient ground for an action against those who disfranchise him, unless malice be shown.⁴ We have mentioned, as one of the causes of disfranchisement, the conviction of a member by a jury of his country of an infamous crime. In such case it is apprehended a vote of expulsion would be legal, without any notice or preferment of charges ; however proper and necessary those ceremonies may be, when the offence has a particular reference to the corporate interests.

§ 5. If private corporations have an incidental power of disfranchising a member in certain cases, they would seem *a fortiori* to have the power of amoving, when the interests and good government of the corporate body requires it, their official agents from the stations assigned to them, and before the expiration of

¹ *Rex v. Liverpool*, 2 Burr. 734.

² *Exeter v. Glyde*, 4 Mod. 37.

³ *Rex v. Lyme Regis*, Doug. 174.

⁴ *Rex v. Feversham*, 8 T. R. 356 ; *Harman v. Tappenden*, 1 East, 562, and see *Fuller v. Plainfield Academic School*, 6 Conn. R. 532.

the term for which they were appointed. Suppose, says Lord Mansfield, in the case of a municipal corporation, a by-law made "to give power of amotion for just cause, such a by-law would be good," and if so, he adds, "a corporation, by virtue of an *incidental* power, may raise to themselves authority to amove for just cause, though not expressly given by charter."¹ So, the court in Lord Bruce's case say ; "The modern opinion has been, that a power of amotion is *incident* to the corporation."² Lord Mansfield, in *Rex v. Richardson*, specified three sorts of offences for which an officer might be discharged. First, such as have no immediate relation to the office, but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise. Secondly, such as are only against his oath, and the duty of his office as a corporator ; and amount to breaches of the *tacit* condition annexed to his office. Thirdly, the third offence is of a mixed nature ; as being an offence not only against the duty of his office, but also a matter indictable at common law. And Lord Mansfield considered the law as settled, that though a corporation has *express* power of amotion, yet for the first sort of offences there must be a previous indictment and conviction ; and, that there was no authority since *Bagg's case*,³ which says, that the power of *trial*, as well as amotion, for the second sort of offences, is not incident to *every* corporation. He also observed ; "We think that from the reason of the thing, from the nature of the corporation, and for the sake of order and government, this power is *incident*, as much as the power of making by-laws."⁴

We have not been successful in our endeavor to find any precedent, directly applicable, in favor or against the incidental power of *private* corporations to remove their officers. The English books, however, afford a very considerable number of adjudged cases, relating to the causes that are sufficient for the

¹ *Rex v. Richardson*, 1 Burr. 539.

² Lord Bruce's case, 2 Strange, 819.

³ 11 Co. 99.

⁴ And see *Rex v. Lyme Regis*, Doug. 149.

removal of officers in *municipal* corporations. A summary of these cases it is our duty to lay before the reader, as they have at least a strong, if not a direct, bearing upon the kind of corporations to which our treatise is more particularly confined.

§ 6. A distinction is made between such persons as hold a *ministerial* office, and such as hold an office of *the essence of the corporation*. A mere ministerial officer, appointed *durante bene placito*, may be removed without any other cause, than that the pleasure of those who appointed him is determined; and a formal motion for the appointment of another to the office is sufficient, without resorting to notice. In these cases, says Mr. Willcock, the right to remove is, of course, incidental to the right of appointment.¹ And a ministerial officer may be so removed, when appointed *durante bene placito*, where the power of appointment is "for life," or "during pleasure."² Of this class is a town clerk or recorder; that is, it seems, where the recorder is a mere counsel to advise, and not one who has a corporate office and voice in the common council.³ But there cannot be a custom to remove at pleasure from an office of the essence of the corporation; such, for example, as an alderman; for he has a franchise in his office.⁴

The following is a summary of the cases in which it was held, that there were sufficient causes for discharging such officers of a municipal corporation as are not removable at pleasure, on account of a dereliction of their corporate duty.

¹ Willcock on Mun. Corpor. 253.

² Ibid. 254.

³ Dighton's case, T. Ray. 188; S. C. 1 Vent. 77, 82; Rex v. Cambridge, 2 Show. 70; Rex v. Canterbury, 11 Mod. 403; S. C. 1 Strange, 674.

⁴ Dighton's case, 1 Vent. 77, 82; S. C. 1 Sid. 461; Warren's case, Dyer, 332, b. n. And it is wholly unimportant, that there be a custom to elect such officers "during pleasure," or to elect them "during life, if it appear to them expedient," and that it is alleged, that they deemed it expedient to remove them. If such a clause be contained in a charter, it is absolutely void. Willcock on Mun. Corpor. 254, 255. But a custom was alleged for the mayor and major part of the corporation to turn out whom they pleased; on which, Holt, C. J., observed, that there was no remedy for it, the constitution being so; Rex v. Andover, 12 Mod. 665.

Non-residence, having deserted the borough and resided at a considerable distance for the last four years continually, by reason of which he has neglected to attend the business of the corporation, although it does not appear, that any special damage has arisen to the body from his absence, or that the charter required residence.¹ Having deserted his habitation in the city for the space of three years, and been forty times absent from the corporate meetings after general notice, although his presence was not absolutely necessary, is sufficient cause for amoving an alderman; for it is incident to his duty and place to be resident where he is chosen, and such absence renders him incapable of doing his duty where he ought.² Non-residence which has caused a neglect of duty, by which some person is injured in his corporate franchise, is cause for amoving an alderman; but unless residence be required by the charter, it is sufficient, that the corporator at reasonable times attend to the corporate business, although he reside at some distance from the town. Non-attendance at several corporate meetings, after having received proper notice, if, by reason of his neglect, the business of the corporation has been impeded, was held sufficient cause for amoving a recorder;³ and so is the temporary and less frequent non-attendance of an officer, whose duty calls upon him to be constantly present, such as mayor.⁴ So is non-attendance at one corporate meeting appointed by himself, where his presence is proper, though not absolutely necessary, he being in the neighborhood and able to attend, although he did not receive notice at the time of the meeting.⁵ Not accounting for rents by him received in his official

¹ *Rex v. Doncaster*, Say. 39; *Rex v. Trueboy*, 11 Mod. 75; S. C. 2 Ld. Raymd. 1275; *Rex v. Lyme Regis*, Doug. 153.

² *Exeter v. Glyde*, 4 Mod. 36; S. C. Comb. 197; *Vaughn v. Lewis*, Carth. 229.

³ *Rex v. Portsmouth*, 3 B. & C. 156; S. C. 4 D. & R. 775; *Rex v. Trueboy*, 11 Mod. 75.

⁴ *Rex v. Wells*, 4 Burr. 2004; *Lord Bruce's Case*, 2 Strange, 819, and notes; *Rex v. Ipswich*, 2 Ld. Raymd. 1233; S. C. Salk. 443.

⁵ *Atk. 184*, Case 56; *Bul. N. P. 206*, 207. Continued absence of about five years, and general neglect of attending when courts were to be held,

capacity, and charging for payments never made, was held a sufficient cause for amoving a chamberlain ; provided it appears that he had been called upon to account.¹ Razing of genuine and true entries in the corporation books, to falsify them, and injure the corporation ; but a general allegation, that he razed and altered the books is insufficient, for the rasure or alteration may have been to correct an entry originally erroneous.² Being so poor that he was not able to pay the taxes, for which he was liable in the municipality, was adjudged to be sufficient cause for the amoving an alderman.³ Habitual drunkenness was cause for amoving an alderman, on account of his consequent insufficiency to discharge his peculiar duties.⁴ Disturbing the election of mayor, or preventing the corporators from assembling in their business in the corporate assembly ; and the amotion may be before a conviction for riot.⁵ Bribing a corporator to vote for a particular candidate to fill an office in the corporation, such as that of mayor, or to vote for a candidate at the election of members of parliament ; but there should be a previous conviction by a jury.⁶

We will next proceed to enumerate the causes that have been relied upon in returns of an amotion, and which were held to be *insufficient*, in cases of municipal bodies corporate.

That, which only disqualified the person to be elected, although it made the election voidable *ab initio*, is insufficient ; for one so disqualified is not in law a corporate officer, and therefore cannot be amoved by the corporation, but must be ousted by proceedings *in quo warranto*. Of this nature is non-residence, when required

was sufficient for amoving a recorder, though no particular mischief had arisen to the corporation from his neglect. *Semb.* Lord Hawley's Case, 1 Vent. 115. But it may be observed that other charges were brought against this recorder. *Rex v. Ipswich*, 2 Ld. Raymd. 1237, and see 2 Burr. 2004.

¹ *Rex v. Doncaster*, 2 Ld. Raymd. 1566 ; but see *Rex v. Chalke*, 1 Ld. Raymd. 226.

² *Rex v. Chalke*, 5 Mod. 257 ; S. C. 1 Ld. Raymd. 226.

³ *Rex v. Andover*, 3 Salk. 229.

⁴ *Rex v. Taylor*, 3 Salk. 231 ; *Taylor v. Gloucester*, 1 Rol. 409 ; S. C. 3 Bulstr. 190.

⁵ *Haddock's Case*, T. Ray. 339 ; *Rex v. Derby*, C. T. H. 155.

⁶ *Rex v. Tiverton*, 8 Mod. 186.

only as a qualification before election, or any irregularity in the election or admission. And if a corporator so disqualified, or illegally coming into office, has held it undisturbed for six years, being protected by the statute against an ouster in *quo warranto*, he cannot be amoved by the corporation declaring his office originally void on this account, but has acquired an indisputable title.¹ Non-residence is not a sufficient cause of amotion, unless residence be required by the charter, or the non-residence be attended with some special injury to the corporation.² Departure from the borough and its liberties about five months before with his family, and not having returned at the time of the amotion, is not sufficient to warrant it, unless a special damage has been caused to the borough, by such absence.³ Residing two or three miles from the borough, and non-attendance at a meeting of the common council, is not of itself a sufficient cause; for it is not the imperative duty of a common-council man to attend every assembly, and his general attendance is sufficient.⁴ Absence of a portman from four occasional great meetings, one of which was on the charter day, he having received ordinary but no particular notice, when it did not appear that any business was by that means impeded, is not sufficient cause.⁵ Nor is absence of a recorder from the corporate meeting, not having received a special notice that his appearance was necessary, and the corporation having received no inconvenience from his absence.⁶ Razing entries in the corporation books, unless it be shown that they were originally correct, and that the rasure was mischievous, or to falsify them, is an insufficient cause. It has been held to be insufficient cause for amoving an alderman, that he used insulting words to the

¹ *Rex v. Doncaster*, Say. 40; *Rex v. Miles*, B. N. P. 203; *Rex v. Lyme Regis*, Doug. 85; *Symmers v. Regem*, Cowp. 502.

² Unless a penalty is imposed for not residing. *Rex v. Williams*, 2 M. & S. 144.

³ *Rex v. Leicester*, 4 Burr. 2087.

⁴ *Rex v. Doncaster*, Say. 39.

⁵ *Rex v. Richardson*, 1 Burr. 540.

⁶ *Rex v. Wells*, 4 Burr. 2003; and see also *Rex v. Pomfret*, 10 Mod. 108, and *Rex v. Exeter*, Comb. 197.

mayor in common council, as saying that he was a base fellow, &c ; or for amoving a common-council-man, for saying of an alderman that he was a knave ; for personal offences from one member to another are to be punished according to law, and not by the corporation.¹ Refusal to deliver over the corporation books entrusted to his custody, as the proper officer, to persons applying for them with an order from the corporation, is insufficient, for the books may be consulted in his hands.² Refusing to pay the usual fee on admission to the livery, or his share towards the expense of the renewing charter, are not causes of amotion, but the proper subjects of a by-law, which the body has power to make for enforcing such payments when reasonable.³ Mis-employment of funds in his custody, when it is the proper subject of an action, is not sufficient generally, though it may be a good cause of suspension from a financial office.⁴ Casual intoxication, it was held, was not sufficient cause for amoving an alderman, for this is likely to happen to the best of them.⁵

§ 7. It is of course necessary in the removal of an officer, that there should be a meeting of the corporation, or of such part of it as has been designated and empowered for that purpose. And it is also necessary, that the proceedings should be conducted in such a manner, that the officer may have a fair opportunity of defending himself.⁶ As to the form required in amoving a *ministerial* officer, elected during pleasure,⁷ very little formality

¹ *Rex v. Chalke*, 1 Ld. Raymd. 236 ; S. C. 5 Mod. 259 ; *Rex v. Oxford*, Palm. 466 ; *Jay's Case*, Vent. 302 ; *Earle's Case*, Carth. 174 ; *Rex v. Lane Fortese*. 275.

² Or detainee will lie for them, if the corporation have a right to compel the delivery ; or a mandamus, *Anon.* 1 Barnard, 402 ; *Rex v. Ipswich*, 2 Ld. Raymd. 1238 ; *Rex v. Ingram*, 1 W. Bla. 50.

³ *Taverner's Case*, T. Ray. 446 ; 1 Sid. 282.

⁴ *Rex v. Chalke*, 1 Ld. Raymd. 226 ; *Rex v. Mayor of London*, 2 T. R. 182.

⁵ *Rex v. Taylor*, 3 Salk. 231.

⁶ As to the form of notice, preferment of charges, &c., see § 4, of this Chapter.

⁷ See § 6, of this Chapter.

is requisite. Such an officer is not entitled to any notice ; and a summons to those, who have the power of amotion and the authority to elect another, is sufficient without a summons to convene to amove him from office. And if those who have the power of amotion elect a new officer, this act is of itself an amotion of the former officer, without a declaration of his amotion. It would, therefore, have no weight, if those who voted for the new officer were under the impression, that they were electing him to a vacancy, and who would not have voted for the amotion of his predecessor.¹

§ 8. An amotion from one office does not of course in the least impair the title of the person amoved to another office ; and much less is it a disfranchisement from his right as a mere member of the corporation.² If the amotion is legal, it will not invalidate any act which the corporator may have previously done, or in which he may have concurred ; but from the moment of amotion, his official authofity *ipso facto* ceases, and another may be elected into the vacant place. Should the person amoved continue to act, he is a mere usurper without color of title, unless it be acquired by length of time ; he may be ousted in *quo warranto*, and punished for the usurpation ; and all corporate acts in which he has concurred are equally void, as though he had never been elected.³

§ 9 When a corporator has been excluded from participating in corporate business, in which he has a right to act, under pretence of amotion or suspension, (the latter being a temporary amotion,) he is entitled to a writ of restoration, to which the court will compel obedience, unless it be shown that the amotion relied upon was legal.⁴ A restoration is merely an abstaining, on the

¹ *Rex v. Canterbury*, 11 Mod. 403 ; *Rex v. Thame*, 1 Strange, 115 ; *Rex v. Taunton*, Cowp. 413 ; *Rex v. Pateman*, 2 T. R. 777.

² Willcock on Mun. Corpor. 268.

³ *Jay's Case*, 1 Vent. 302 ; *Symmers v. Regem*, Cowp. 503.

⁴ Willcock on Mun. Corpor. 269 ; *Fuller v. Plainfield Academic School*,

part of the amoving body, from opposing the right of the corporator to transact the duties and enjoy the franchises appertaining to his office. As the effect of the restoration is not to create the person an officer *de novo*, and give him a new title, and as it replaces him exactly in the same situation in which he stood before the attempted amotion ; all corporate acts, in which he has concurred between the moment of his amoval and restitution, are of equal validity as if he had never been amoved. If he were before a legal officer, such acts are legal ; if he were only an officer *de facto*,¹ his acts before his amoval, during the amotion and subsequently to the restoration, are equally voidable, and he may be ousted in *quo warranto* for any defect in his original title. If he were originally a legal officer and amoved for sufficient cause, but restored on account of informality in the amotion, all his corporate acts both before and since the amotion are valid ; but he may again be amoved in a more formal manner, which vacates his office from the time of the second amotion, but has no retrospective effect upon the former irregular amotion. Indeed if the amotion were voidable on account of an insufficient cause, or insufficiency in the form in which it was effected, the person has not been ousted ; and if he continues to be treated as an officer, and acts as such, there is no need of a writ of restoration.²

§ 10. The power of disfranchisement and amotion, unless it has been expressly confided to a particular person or class, is to be

6 Conn. R. 532 ; Howard v. Gage, 6 Mass. R. 462 ; See post, chapter treating of Mandamus.

¹ To constitute even an officer *de facto*, there must be at least the forms of election, though these may, upon legal objections, be afterwards found defective. Willcock on Mun. Corpor. 280.

² The principles we have just stated are laid down by Mr. Willcock, who cites in support of them Taylor v. Gloucester, Cowp. 503 ; Rex v. Ipswich, 2 Ld. Raymd. 1283 ; S. C. Salk. 448 ; Symmers v. Regem, Cowp. 503, and see Mr. Willcock's Treatise, p. 260 to 270. Where an office is already filled by a person, who is in by color of right, the proper remedy is by information in the nature of a *quo warranto*, and not by *mandamus*. People v. Corporation of New York, 3 Johns. (N. Y.) Cas. 79.

exercised by the corporation at large, and not by the person or class in whom the right of appointing or admitting is vested. For this reason, when an amotion is pleaded, if the authority by which it has been transferred to a select class be not shown, it will be construed to be in the body at large, and must be proved to have been exercised by the whole corporation.¹ If the power of amoving certain officers be antecedently in a select body ; and the corporation accept a new charter, silent upon that head, but making other alterations and recognising or confirming such body, although under a different name, and in general terms confirming the corporation in all cases where no alterations are introduced, the right of amotion still continues in this select body.² It has not been directly determined, says Mr. Willcock, though it was assumed by Lord Mansfield, that the power of amotion may be transferred to a select body by a by-law in the same manner as the right of election.³ It was said that when a common council had the sole right of election and making by-laws, there is some foundation for thinking that they possess the power of amoving those whom they elect, though claiming it neither incidentally nor by grant of the charter.⁴ Mr. Willcock apprehends, that when the corporation is prescriptive, this is evidence for a jury to presume a custom, if nothing contradictory appear ; but in a corporation by charter, such a power, he is confident, must be shown to have been expressly granted by the charter, or a subsequent by-law, or at the utmost these facts should be left to a jury as evidence of a lost by-law.⁵

¹ Willcock on Mun. Corpor. 245, 246 ; Lord Bruce's case, 2 Str. 819 ; Rex v. Lyme Regis, Doug. 153 ; Rex v. Doncaster, Say. 38, 249 ; Rex v. Richardson, 1 Burr. 539 ; Rex v. Ponsonby, 1 Kenyon, 29 ; Rex v. Feversham, 8 T. R. 536 ; Bagg's case, 11 Co. 99 ; Rex v. Sadler, Styles, 477 ; Rex v. Oxford, Palm. 452.

² Willcock on Mun. Corpor. 246 ; Haddock's case, T. Ray. 239 ; Rex v. Knight, 4 T. R. 429.

³ Willcock, ut supra ; Rex v. Richardson, 1 Burr. 539 ; Cowp. 502.

⁴ Rex v. Doncaster, 1 Barnard, 265.

⁵ Willcock, ut supra, 247, 248.

§ 11. It is said that an office may be resigned in two ways, either by an express agreement between the officer and the corporation, or by such an agreement implied from his being elected to another office incompatible with it.¹ And some of the acts and delinquencies, such as removing and residing at a distance, which have been mentioned as causes of amotion, may be properly regarded as an *implied* resignation.² To complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, and thereby treating it as vacant.³ Every corporation has an incidental power of accepting the resignation of its officers ; and therefore, when it is averred generally, that the resignation was made to a corporate assembly, if the right to receive it be in a select body, *that* should appear on the pleading, and how it was acquired by them.⁴ It is presumed that the right to accept a resignation passes incidentally with the right to elect ; for it is not a power to be compared with that of amotion, and it seems that an office should be relinquished by the consent of those in whose authority it originated.⁵

A resignation by *implication* may not only take place by an abandonment of the official duties as before mentioned, but also by being appointed to and accepting a new office, incompatible with the former one. It was supposed at one time, that such a resignation could only be where the second office is superior to the former. It has, however, been determined to be unimportant, and that if one, holding as superior office, accept a subordinate one that is incompatible, the appointment to the second operates to vacate the former.⁶ But election of an officer to an incompatible

¹ Willcock on Mun. Corpor. 238.

² Ibid.

³ Ibid. 239 ; *Rex v. Lane*, 2 Ld. Ray. 1304 ; S. C. 11 Mod. 270 ; *Rex v. Rippon*, 1 Ld. Ray. 563 ; *Jenning's case*, 12 Mod. 402 ; *Hazard's case*, 2 Rol. 11.

⁴ *Rex v. Tidderly*, 1 Sid. 14.

⁵ See Willcock, *ut sup.*, and *Rex v. Tidderly*, *ut sup.*

⁶ This is an absolute determination of the original office, and leaves no

office does not vacate the former, before acceptance by the officer ; for although the corporation has a right to the service of all its qualified members, in any office to which they are elected, yet they having been already appointed to one, that is a temporary disqualification, which renders them ineligible to the other ; and the corporation, having chosen to elect them, must be presumed to have been aware of that circumstance, and to have precluded themselves from calling again upon their services.¹ Where the offices are not in fact incompatible, acceptance of a second may be a resignation of the first, on account of the form of the constitution ; for it is not to be presumed that when the government constitutes a certain number of distinct offices, it means that the corporation may consolidate two or more of them in one person.²

shadow of title to the possessor ; so that neither quo warranto nor amotion is necessary before any other may be elected. *Willcock*, on *Man. Corp.* 240 ; *Gabriel v. Clarke*, *Cro. Car.* 138 ; *Verrior v. Sandwich*, 1 *Sid.* 305 ; *Rex v. Godwin*, *Doug.* 383, n. 22 ; *Millward v. Thatcher*, 2 *T. R.* 87 ; *Rex v. Pateman*, 2 *T. R.* 779. The offices of mayor and aldermen, being judicial offices, are incompatible with that of recorder, who is an adviser to them. *Rex v. Marshall* cited in *Rex v. Trevenner*, 2 *B. & A.* 34.

¹ *Willcock*, ut sup. *Barton's case*, *Popham*, 176 ; *Millward v. Thatcher*, ut sup. *Rex v. Pateman*, ut sup.

² *Millward v. Thatcher*, ut sup. If the corporation consist of mayor, recorder, town clerk, and twelve aldermen, the recorder or town clerk cannot be an alderman, though there be no inconsistency in the duties of the two officers, for such a method of electing would reduce the corporation to a mayor and twelve or thirteen other officers instead of fourteen, of which it ought invariably to consist. *Ibid.* ; and *Willcock*, ut sup. 243.

CHAPTER XIII.

OF THE BURTHENS TO WHICH THE BODY CORPORATE IS SUBJECT ; AND OF ITS LIABILITY TO BE TAXED.

HAVING concluded the consideration of the rights and capacities incident to corporations, we shall now proceed to treat of the burthens to which they are subject.

§ 1. There is no reason why corporations should not be subject to the same burthens, in the character of *owners or occupiers* of lands and houses, to which individuals are subject in the same character ; and such has always been the understanding.¹ Thus, Lord Coke, commenting on the word *inhabitants*, in the statute made in the time of Henry VIII, for the repair of bridges, says, that every corporation, residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, riding, city, or town corporate, *quæ propriis manibus et sumptibus possident et habent*, are inhabitants within the purview of the statute.² And where any general duty is imposed by the government, in respect to houses and lands, corporations are liable in respect to *their* houses and lands, in the same manner as private persons.³

¹ 1 Kyd on Corp. 317.

² 2 Inst. 703.

³ Thus, where a duty was imposed upon *hearths*, and officers with a constable were empowered to distrain, if the party refused to pay the duty by the space of an hour ; and in a special verdict in an action of trespass, brought by the Ironmonger's Company, it was found that the company was seised in fee of five messuages, in which were thirty-five hearths ; that the company had never finished the messuages, but that from the time of building they had stood unoccupied ; that the defendants, being lawfully authorized, had demanded the duty of the company, which they refused to pay, on which the defendants took the distress and kept it till the company paid the duty ; the general question made was, whether the *owner* of a new house, uninhab-

Corporations in England have always been considered rateable to the repairs of a church in respect of their corporate lands ;¹ and so they have been considered bound exclusively to the repair of a highway, or of a bridge, or of a creek, by reason of the tenure of certain lands, or from usage time immemorial.²

In the case of *Rex v. Mayor, &c. of Stratford upon Avon*,³ the question agitated was, whether the corporation existed by prescription ; and as a consequence resulting from the decision of such a point, whether they were bound to repair a bridge. It was said by the court, it is clear, that there had been a guild and corporation in this place, which were dissolved at the time of granting the charter of Edward VI. ; and that charter also states, that the borough of Stratford upon Avon is an ancient borough, within which that guild was. It is also clear, that the expressions in the charter do not simply denote a town with inhabitants, because it refers to franchises, &c., and also to certain charges which they were bound to sustain and perform, which seems to carry the notion of their being a corporation. Then, comparing this with the parol evidence as to the constant practice of the corporation to repair the bridge from time to time, without any such condition imposed on them by the charter, in respect of the grant of lands, we cannot say, that there is not sufficient evidence on the face of the charter, coupled with the constant practice of the corporation to bear the burden of repair, to warrant the conclusion of the jury, that this was a corporation by prescription. But that is not enough to sustain the verdict, because, if the charge of repairing the bridge of right belonged formerly to the guild, and not to the corporation existing at the same time, it cannot be

ited from the time of building, ought to pay this duty. But no question was made, whether as a corporation they were liable to the tax ; it was taken for granted, that if *any* would have been liable, *they* were so too. *Iron Mongers' Company v. Nalor*, 2 Mod. 185 ; 1 Ventr. 311 ; 3 Keb. 719, cited in Cowp. 84, and 1 Kyd, 318. So a corporation in England is liable to the poor rates. *Curtis v. Kent Water Works*, 7 B. & C. 14.

¹ 1 Kyd, 319.

² 2 Inst. 700 ; *Mayor of Lynn v. Turner*, Cowp. R. 87.

³ 14 East, 348.

supported. The charter says, that the almshouse, school, and bridge were from time to time kept up and repaired by the guild, out of the rents, revenues, and profits of their lands; and that by the dissolution of the guild, the inhabitants would be left liable to great burdens, which they were bound to bear; and then, for the supporting of those great charges, it grants to the corporation the lands which the guild had had, and particularly enjoins them to keep up the almshouse and school, without mentioning the bridge. Now, if the repairs of the bridge had not been a burden upon the corporation before, it was natural to suppose, from the previous recital, that the crown, in granting the lands to the corporation, would have particularly enjoined them to keep up the bridge. Then as the corporation have always, as far back as living memory can go, repaired the bridge, it carries with it a strong probability that that was one of the charges to which the borough, as a corporate body, were before liable."

§ 2. On the same principle, as has been remarked by Mr. Kyd, there is no doubt but that corporations are subject to the land tax.¹ It has been decided in England, that a corporation seized in fee of lands for their own profit are (within the meaning of 43 Eliz. ch. 2) inhabitants or occupiers of such lands, and in respect of them, liable, in their corporate capacity to be rated to the poor.² And the drift of the English authorities goes to establish, that the tolls of canal companies, &c., though not rateable *per se*, yet become so when springing from or connected with land.³ A lock has been deemed in England a real and substantial property, so as to warrant a rateability of tolls received in respect of it. It was argued, that such a rate would be upon the

¹ 1 Kyd, 318; and see *Salem Iron Foundry Co. v. Danvers*, 10 Mass. R. 514.

² *Rex v. Gardner*, Cowp. R. 79.

³ *Rex v. The Proprietors of the Calder & Heble Navigation*, 1 B. & A. 263; *Rex v. Navigation of Salter's Lord Sluice*, 4 T. R. 730; *Rex v. Hull Dock Company*, 5 M. & S. 394; *Rex v. Proprietors of Birmingham Canal Navigation*, 2 B. & A. 570; *Rex v. Churchwardens, &c.*, 12 East, 40; *Rex v. Regent's Canal Company*, 6 B. & C. 720.

dues payable at the lock, and not upon the lock itself; and thus as tolls had been held not rateable, that these profits were exempt. The court, however, considered, that the lock, in this case, was a thing locally situate in the township, and producing profit; and that the addition of dues or rates was merely giving other names for the same subject.¹

Water power for mill purposes, not used, being merely a capacity of land for a certain mode of improvement, cannot be taxed independently of the land. As where a dam extended across a river, the thread of which was the dividing line between two towns, but the water created thereby was applied exclusively to drive mills situated in one of the towns, it was held that the water was not subject to taxation in the other town.²

That corporations are liable to general taxes has also been decided by the Supreme Court of the State of New York, where it was adjudged that, under the act for the assessment and collection of taxes, corporations are liable to be taxed for property owned by them; though the act speaks only of *persons* liable to be assessed, and the term corporation is not used at all.³ In a still later case, in the same State, the question was made, whether the act of 1817, expressly exempting from taxation the property of manufacturing corporations, was repealed by the subsequent

¹ *Rex v. Macdonald*, 12 East, 324; and see *Rex v. Proprietors of the Mersey, &c. Navigation*, 9 B. & C. 95; *Rex v. River Weaver Navigation*, 7 B. & C. 70, note; *Rex v. Trustees of Duke of Bridgewater*, 9 B. & C. 68.

² *Boston Manuf. Co. v. The Inhabitants of Newton*, 22 Pick. (Mass.) R. 22. Shaw C. J. delivered the opinion, that "the only question in this case is, whether the town of Newton have a right to tax the plaintiffs for the property, and under the circumstances mentioned. In the first place, the Court are of opinion, that water power for mill purposes, not used, is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land. But the objection to this mode of taxation is not the only or principal objection to the tax in question. The court are of opinion, that the water power had been annexed to the mills, that it went to enhance the value of the mills, and could only be taxed together with the mills, as contributing to increase their value. As the mills were wholly situated in Waltham, and were taxable there, they were not liable to be taxed in Newton."

³ *Clinton Wool & Cot. Man. Co. v. Morse and Bennet*, cited by Thompson, C. J., in *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 782.

act of 1823, intended as a revision of all the laws upon the subject of taxation, and which provided, that all incorporated companies, receiving a regular income, &c., shall be considered *persons* within the meaning of the act, and that assessments shall be made and taxes imposed, and levied upon them and collected in the same manner as upon individuals, and that the secretaries and treasurers of all *manufacturing* companies, &c. shall deliver a list containing the real estate occupied, and the amount of capital paid in; and it was also made the duty of the treasurer or secretary to pay the amount of tax assessed upon *such company*. This language, the court thought, was as broad and comprehensive as it was capable of being made; and in terms, rendered the real and personal estates of manufacturing companies subject to taxation. And hence, their opinion was, that it repealed the act of 1817, as it fell within the general principle, that *leges posteriores priores contrarias abrogant*.¹ Under the revised statutes of New York, it was held, that moneyed or stock corporations, deriving an income from their capital, are liable to taxation, although the income be not equal to the expenditures of such companies for the twelve months preceding the taxation.² But in that State moneyed corporations are not liable to be assessed to work on the public highways; for within the purview and meaning of an act of the State, they are not subject to such assessments.³

§ 3. Where village taxes are directed to be made upon the freeholders and inhabitants of the village, according to law, a moneyed or stock corporation having its office within the bounds of such village is an inhabitant within the meaning of the act.⁴ A bank located in a village may be assessed for a village tax, voted previous to the bank's going into operation, if before the assessment be

¹ *Columbia Man. Co. v. Vanderpool*, 4 Cowen, 556; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) R. 185; *Blair v. Worley*, 1 Scammon, (Ill.) R. 178.

² *People v. Supervisors of City & County of N. York*, 18 Wend. (N. Y.) R. 605.

³ *Bank of Ithaca v. King*, 12 Wend. (N. Y.) R. 390.

⁴ *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) R. 186.

made, the bank is deriving an income from its capital stock.¹ Bank stock, the property of the Hartford insurance company, a corporation having no local limits, but required by its charter to keep, and actually keeping, its office in the city of Hartford, is not taxable in the town of Hartford.² In the case of the Salem Iron Foundry Company *v.* Danvers,³ it was held by the Supreme Court of Massachusetts, that a corporation is taxable for its real property in the town where it lies, notwithstanding the individual corporators are liable to be taxed for their several shares thereof in the towns where they dwell ; but that the corporate body was not so liable for its personal property, used in and about its manufactory. As to the *personal* estate, the court say ; " Its local situation gives no right to the town of Danvers ; neither is the corporation included among the inhabitants of that town liable to taxation. We should not adopt any construction of the laws, which would subject the same property to be *twice* charged for the same tax, unless required by the express words of a statute, or by necessary implication. We are under no such necessity as to the personal estate. The real owners are liable to be taxed for it in their respective towns ; and there is nothing in the statutes, which subjects the corporation also to be taxed for it in the town where the goods may happen to be found. If it were otherwise, such a corporation would often be taxable in many different towns at the same time. They may purchase the raw materials in one place, and send their manufactures for sale to many others ; and they would be liable to taxation in each of those places, as well as in that where their manufacture was carried on." ⁴

It appears by the case just cited, that with regard to the

¹ Oswego Bank *v.* Oswego Village, 12 Wend. (N. Y.) R. 544.

² Hartford &c. Ins. Co. *v.* Hartford, 3 Conn. R. 15.

³ 10 Mass. R. 514. In regard to political corporations, the understanding has been, in Pennsylvania, that the property of counties is not taxable for city or borough purposes. Piper *v.* Singer, 4 Serg. & Rawle, (Penn.) R. 355.

⁴ The same point was decided in Maine, in Gardiner *v.* Cotton and Woollen Factory, 5 Greenl. (Me.) R. 133.

general powers to impose taxes, bestowed upon *towns*, no such construction can be given to *such* powers, which will subject the same property of a corporation to be *twice* taxed ; and that if the corporate property is taxed in the hands of the stockholders, it cannot, therefore, be taxed in the hands of the corporation. And so it has been held in another case in Massachusetts, under the fifth section of the tax act, by which it is enacted, "that for such goods, &c., or other stock in trade, *including stock employed in manufactories, &c.*," that a manufacturing company, located in the town of Amesbury, was not liable to be taxed by that town, for the personal corporate stock employed in the town.¹

§ 4. It has been the opinion of many lawyers (and among them, some of our most learned jurists and distinguished constitutional lawyers,) that the above principle applies with equal force to the power of a *State*, in relation to the imposition of taxes ; and that no such construction can be given to the power of the *legislative* department, as will subject the property of a corporation to be doubly taxed. The principle, that whenever a general tax is imposed by a State upon real or personal property, every corporation must contribute *pro rata*, provided the corporate stock has not been already assessed in the hands of the individual proprietors of the stock, has been admitted on all hands. If it has been already taxed for its proportionate amount of the general assessment, whatever it is, in the hands of the individual owners, every extra imposition is of course a *specific* tax upon the corporation, (like a tax imposed upon the privilege of selling goods at auction) ; and the great question has been, whether an incorporated body, which has been unconditionally instituted, is liable to such a tax, though unincorporated companies may be.

The first case in this country, in which a question like the

¹ Amesbury Wool. and Cot. Man. Co. v. Amesbury, 17 Mass. R. 461. The Court, in this case, held that the voluntary payment of part of the taxes did not affect the right of the corporation to recover the amount of money paid by them upon the illegal assessment, in an action of *assumpsit*.

above met with a judicial determination, was in 1812, in the case of *Brown v. Penobscot Bank*.¹ It was there decided, that the act which imposed two per cent. per month on the amount of bills of any bank, *of which payment is by such bank refused*, militated with no principle of the constitution, either of the United States, or of the State of Massachusetts. The tax in this case, it will be observed, was inflicted as a *penalty* for the violation of an important corporate duty, and therefore, it affords no authority for the infliction of a similar penalty, in cases where no negligence or misconduct appears. On the contrary, the court say respecting the penalty; "As it had no *retrospective* effect, there was no ground of complaint on the part of the banks." We are led to understand, that the court meant to imply by this expression, that if the tax had not been imposed as a penalty for *future* misconduct, or want of punctuality and promptitude in the performance of duty, it would *not* have been constitutional. The court apparently, in this case, justified the tax as being a proper punishment for a breach of *trust*; and upon the ground, that the corporation had substantially varied from the purposes for which it had an existence. They seemed to have taken the view which Mr. Burke took in his speech on the East India Bill, that every commercial privilege for the mere private benefit of the holders was a *trust*, and that it was the very nature of a trustee to be *accountable*, and the trust even totally to *cease*, when it was perverted from its purpose.² And, if the bank of England, he said, should be oppressed with demands it could not answer, or

¹ *Brown v. President, Directors and Co. of Penobscot Bank*, 8 Mass. R. 445.

² "To whom then would I make the East India Company accountable? Why, to parliament, to be sure; to parliament, from whom their trust was derived; to parliament, which is alone capable of comprehending the magnitude of its object and its abuse, and alone capable of an effectual legislative remedy. The very charter, which is held out to exclude parliament from correcting malversation with regard to the high trust vested in the company, is the very thing which at once gives a title and imposes a duty on us to interfere with effect, *wherever power and authority originally derived from ourselves are perverted from their purpose, and become instruments of wrong and violence.*" — Burke's Speech on E. India Bill.

engagements which it could not perform, no charter should protect the management from correction.¹

But the American books afford us precedents for the infliction of a penalty like the one above mentioned, in the shape of a specific tax upon a corporation, which has not been guilty of any omission of duty or mismanagement.

In the year 1812, in the case of the *Portland Bank v. Apthorpe*, in Massachusetts,² it was decided by the Supreme Court, that an act levying a tax on the stock of an Incorporated Banking Company, whose charter existed prior to the passing of the act, was within the constitutional authority of the legislature. The question was taken up by the court, not in reference to the constitution of the United States; and the prohibition therein contained, as to the *impairing the obligation of contracts*, is not noticed. It was considered wholly in reference to the constitution of Massachusetts, and to the words of that constitution, which authorize the legislature "to impose and levy proportionate and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying within the commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same." The court admitted, at once, that the tax could not be justified under the *first* branch of the before mentioned power, viz. that which required taxes to be *proportionate*; the exercise of which required, they said, an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his *proportion* of that property. And the court say expressly; "To select any individual or *company*, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution." They then refer to the *second* branch of the before mentioned power, relating to reasonable duties, and

¹ Ibid.

² *President, Directors and Co. of Portland Bank v. Apthorpe*, 12 Mass. R. 252.

excises, upon goods, merchandise, and *commodities*. This last word, the court consider, will embrace every thing, which may be a subject of taxation ; and that it had always been applied by the *Massachusetts* legislature to the *privilege of using particular branches of business, or employment*, as the business of an auctioneer, tavern-keeper, retailer of spirits, &c. The Court in fact considered, that under the general term "commodity" the legislature, in subjecting an *incorporated* bank to a *specific* tax, were authorized so to do, because they might exact sums of money from vendue-masters, retailers, and other persons, who have a *natural* right to exercise certain employments, until forbidden by the government ; and because the legislature, when they granted the charter, did not expressly relinquish the right of levying a tax upon the business the corporation should transact, during the continuance of its charter. They give this hypothetical case ; Suppose, that heretofore the legislature should have enacted, that no person should keep a public house, or retail spirituous liquors, without a license from some authority by them designated ; but without exacting any tax or duty therefor ; could it be contended, that afterwards they were precluded from establishing a tax or excise upon the business thus permitted to be exercised ? "

We know no case, where an individual, whether he has paid a certain sum in *money* or not, if he has made a contract with the government, or any of its authorized agents, by which he has been licensed to prosecute any kind of business or trade, can be called on to pay for the privilege, before the expiration of the license.

A grant of a charter of incorporation, it was held in the case of *Dartmouth College*, and in other cases, is an executed contract, and if such a grant is a contract, what does the contract amount to, but a grant of the privilege of pursuing the trade for the prosecution of which the corporate body was organized, without the imposition of any new conditions or exactions ? What we mean is, that although the *State* may be one of the parties to a contract, yet it is no more capable of exacting the performance of new conditions from the party

with whom it contracts, than the latter has of exacting more advantageous terms from the State. Suppose that a State in creating a bank should impose an annual tax of *one per cent* on its capital, and make no express reservation of a right to impose any greater tax. The tax being inserted in the charter becomes a part of the contract, and is a consideration in addition to the public good for the privilege of incorporation. Would it be pretended, in such a case, that the State is competent to increase the tax, thus imposed, at its discretion? Most certainly not. The very nature and terms of the contract, as every one must admit, carry with it a pledge, that no innovations are to be made, nor new taxes imposed, so long as the annual tax originally agreed upon by the contracting parties is faithfully paid. Suppose, also, that a bonus of \$ 10,000 is paid by the corporators for their bank charter, — the State, it will not be pretended, could pass a subsequent act, requiring the corporation to pay \$ 15,000, instead of the sum specified in the charter. Even a refusal on the part of the corporators to pay the \$ 10,000, as agreed upon, could not be a greater breach of the contract. And what stockholders of a bank would stipulate (which is commonly done) to pay a tax, or bonus, with a conviction, that the legislature possessed an unlimited power to alter and increase it at its pleasure? Where there is a mutual consideration, the contract is clearly obligatory on each of the contracting parties. There can, therefore, be no difference between the cases which have been supposed, by way of illustration, and a charter granted without requiring a tax or bonus. The public good, of itself, is a consideration as strongly binding on the faith of the legislature, as though there had been an additional consideration of a pecuniary nature.

In the case of *Dartmouth College*, the Trustees of that institution were divested, by a law of New Hampshire, of the property which they held from the founder, and which was transferred to other Trustees, for the support of a different institution, called "*Dartmouth University*." The law in this case was decided to be unconstitutional, on the ground of impairing the obligation of a contract. Now it is extremely difficult to perceive, that this case is in any respect different, *in principle*, from the one immediately under consideration. And the difference in principle could not

have been any greater, if the legislature of New Hampshire had appropriated the funds of the College to the *public treasury*. In each case, the contract is essentially *altered*, and in each case, therefore, its obligation is essentially *impaired*.

The principle recognised by the Supreme Court of Pennsylvania,¹ that all trades and occupations, by which men acquire a livelihood, may be taxed, has as a general principle, we apprehend, never been controverted; and the only question, which can arise in such a case, is as to the effect of a power bestowed and license given to carry on the trade or occupation, by a charter.

By an act of the legislature of Rhode Island, it was directed, that all the banks in the State should annually pay to the State a tax, at the rate of twelve and a half cents upon every one hundred dollars of the capital stock actually paid in. This tax, it will be observed, was a specific tax upon the corporation, and was in addition to the general State tax. The charters of several of the Rhode Island banks — among which was the Providence Bank — are unlike those which are granted at this day; that is, they are free and unconditional, and were granted without any limit as to time. The Providence Bank refused to pay the tax as above exacted, on the ground, that it was a burthen upon its corporate franchises, the power to impose which was not expressly reserved in the charter. Its property was accordingly seized by the sheriff, upon the warrant of the State Treasurer, to the amount required by the act. The sheriff and treasurer were thereupon both sued in an action of trespass, and it was thus, that the question of the constitutionality of the above law was finally brought before the Supreme Court of the United States.²

Now it will be observed, that the question, presented by the above statement of facts, was not whether the *capital* of the bank was exempted from taxation, and no such idea appears to have been advanced in the argument of the counsel for the bank; but the point in controversy seems to have been, whether the grant of the charter opened to the State any *new* source of revenue. The right of the State to tax the property, both real and personal of

¹ Riddle v. The Commonwealth, 13 S. & Rawle, (Penn.) R. 409.

² Providence Bank v. Billings, 4 Peters, R. 514.

the bank, appears to have been admitted ; that is to say, were there a general State tax upon real or personal property, the property composing the capital of the bank was liable thereby to contribute its proportion. In the opinion of the Court, however, it appears to be assumed, that the bank was contending against any such liability. Thus, say the Court ; “ The charter contains *no stipulation promising an exemption from taxation.*” Again ; “ No words have been found in the charter which, in themselves, would justify the opinion, that the power of taxation was in the view of either of the parties, and *that an exemption from it was intended, though not expressed.*” It appears by this language, certainly, that the Court took the ground, that the bank claimed an entire exemption from the general and ordinary imposition of a State tax ; and the opinion of the Court, from almost the beginning to the conclusion, is bottomed upon that basis.

We much doubt if there is any man who would refuse to accede to the proposition laid down by the Court, that “ the taxing power is of vital importance, and, that it is essential to the existence of the government ; ” or who would hesitate in admitting, that “ the relinquishment of such a power is never to be assumed.” But the claim of the Providence Bank, as we should understand it, (and as we know it is understood by others,) was not for any *relinquishment* of the taxing power of the State. On the contrary, the ground, upon which the bank proceeded, was not in the least in derogation of any prerogative the State might have exercised, if it had never given such a charter. Before the franchise which was guaranteed by the charter existed, it would be nonsense to say the franchise could be taxed ; and when the franchise was ushered into being, the question was, whether the power to tax it *did attach*. We are unable to view the real question in this case in any other light than the following. Did the right to tax the franchise conferred by the State *EVER EXIST* ? and not whether it has been *impliedly exempted* from the right. It would seem, however, to have been the view of the court, that the bank had arrogated to itself an entire freedom from the power which the State had, before the establishment of the bank, to tax the property composing its capital, in common with all other property.

"The plaintiffs," say the Court, "would give to this charter the same construction, *as if it contained a clause exempting the bank from taxation on its stock in trade.*"

The Court say again, that "*Land* has in many, perhaps in all the States, been granted by the government since the adoption of the Constitution. This grant is a contract, the object of which is, that the profits issuing from it shall enure to the benefit of the grantee ; yet the power of taxation may be carried so far as to absorb those profits. Does this impair the obligation of the contract ? The idea is refuted by all, and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases aforesaid. *Yet if the proposition for which the plaintiffs contended be true, it carries us to this point.*" Now, with the most profound respect for the opinion of the judges of the Supreme Court, we are compelled to say, that we cannot agree, that the proposition really contended for by the plaintiffs goes to the extent here pronounced. We do not wish for a better example, by the way, than that given by the Court (of land) to illustrate the precise principle which, as we conceive, was contended for by the Providence Bank. The bank put their case upon the principle which admits, that every man who receives a grant of land from the State is liable to be taxed for it ; but which denies the power of the State, after having taxed the land, to exact the payment of any *additional* impost. The bank acquiesces in the claim of the legislature to tax the whole of its property to the same extent, that all other property is taxed, but resists the claim to all extra pecuniary burthens. But if asked, "If the policy of the State should lead to the imposition of a tax upon *unincorporated* companies, could those which might be incorporated *claim an exemption ?*" We apprehend, that no one would say, there was any distinction between unincorporated companies and those incorporated, where a general tax is imposed upon real or upon personal property. In one point of view, however, there is an important distinction between them, (and one which we believe has never been denied,) which is — if the legislature should enact, that in future no association should prosecute the business of banking, unincorporated companies established for that purpose

would be reached by it, whereas companies unconditionally *licensed* for that purpose would not be. The existence of the former is always at the mercy of the legislature ; but the existence of the other is put, by solemn stipulation, completely beyond the legislative power to destroy it.

Again, say the Court ; “ Any privileges which may exempt it (the corporation) from the burthens common to individuals, do not necessarily flow from the charter, but must be expressed in it, or they do not exist.” We inquire of every person, who has attentively examined the case of the Providence Bank, whether that bank has demanded an exemption from the *burthens common to individuals* ? And whether the point at issue was not, that all *exactions* upon the *privilege*, conferred by the charter, “ must be expressed in it, or they do not exist.” The bank say, that while they are subject to the same *burthens*, they have the same *rights* as individuals. What in fact it appears the bank wished to have decided, was, 1st : If an individual upon a good consideration is unconditionally licensed to pursue a particular occupation, can he be called upon by a specific tax to pay, at a future period, any thing more than what was stipulated in the contract ? and, if not, 2d : Whether a corporate body which has been thus licensed can be called upon for that purpose ; and 3d : Has not the Providence Bank by the free, unconditional, and unqualified terms of its charter, been established and *licensed* to pursue the trade of banking ? In the celebrated case of Dartmouth College, the trustees of that institution were divested by a law of New Hampshire of the property which they held from the founder, and which was transferred to other trustees for the support of a different institution called “ Dartmouth University.” The law in this case was held to be unconstitutional. Now, would it not have been equally unconstitutional if the funds had been drawn away by a *specific tax* ?¹

¹ As the prerogative of taxation is one of great importance, and one that is often abused, we shall here cite the observations upon it, which we find in the 2d volume of Kent's Commentaries, p. 268.

“ Every person is entitled to be protected in the enjoyment of his proper-

The act incorporating the Northern Bank of Kentucky required the payment, by the corporation to the State, of a tax of twenty-five cents per annum on each share of the stock, which might be increased to not exceeding fifty cents, or diminished.

ty, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of government. It is not sufficient, that no tax or imposition can be imposed upon the citizens, but by their representatives in the legislature. The citizens are entitled to require, that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed. A just and perfect system is still a desideratum in civil government, and there is constantly existing well founded complaint, that one species of property is made to sustain an unequal, and consequently, an unjust pressure of the public burthens. The strongest instance in this State, and probably in others, of this inequality, is the assessment of taxes upon wild and unproductive lands; and the oppression upon this description of real property has been so great, as to diminish exceedingly its value. This property is assessed in each town by assessors residing in each town, and whose interest it is to exaggerate the value of such property, in order to throw as great a share as possible of the taxes to be raised within the town upon the non-resident proprietor. The wild land, which the owner finds it impossible to settle, or even to sell, without great sacrifice, and which produces no revenue, is assessed not only for such charges as may be deemed directly beneficial to the land, such as making and repairing roads and bridges, but for all the wants and purposes of the inhabitants. It is made auxiliary to the maintenance of the poor, and the destruction of wild animals; and the inhabitants of each town have been left to judge, in their discretion, of the extent of their wants. Such a power vested in the inhabitants of each town of raising money for their own use, on the property of others, has produced, in many instances, very great abuses and injustice. It has corrupted the morals of the people, and led to the plunder of the property of non-resident landholders. This was carried to such enormous extent in the county of Franklin, as to awaken the attention of the legislature, and to induce them to institute a special commission, to inquire into the frauds and abuses committed under this power, and also to withdraw entirely from the inhabitants of new towns the power of raising money by assessments upon property, for the destruction of noxious animals. The ordinance of Congress, of the 13th of July, 1787, passed for the government of the northwestern territory, anticipated this propensity to abuse of power, and undertook to guard against it, by the provision, that in no case should any legislature within that territory tax the lands of non-resident proprietors higher than those of residents. There is a similar pro-

This was held to be a contract between the State and stockholders, which exempted the stock from any other taxation.¹ And where the act incorporating a company in New Jersey provided for the payment of certain taxes to the State, and then enacted, "that no burthen or other taxes or imposts should be levied or assessed upon said company;" it was held, that this does not exempt the franchises or privileges merely of the company, but the company generally and its property, from taxes, for county, township, and all other purposes than those stated in the charter.²

By a clause in the charter of the Newton Bank, in North Carolina, it is enacted, that a tax of one per centum shall be levied on all stock holden in said bank, except on the stock holden by the State, which shall be paid to the treasurer of the State by the president or cashier of the bank, on or before the

vision in the constitution of Missouri, and one still broader in that of the State of Illinois. It is declared, generally, in that of the latter State, that the mode of levying a tax shall be by valuation, so that every person should pay tax in proportion to the value of his property in possession.

"This duty of protecting every man's property, by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government, and frequently is found to be the most difficult in the performance. Mr. Hume looked upon the whole apparatus of government, as having ultimately no other object or purpose than the distribution of justice. The appetite for property is so keen, and the blessings of it are so palpable and so impressive, that the passion to acquire is incessantly busy and active. Every man is striving to better his condition; and in the constant struggles and jealous collision between men of property and men of no property, the one to acquire, and the other to preserve, and between debtor and creditor, the one to exact and the other to evade or postpone payment, it is to be expected, especially in popular governments, and under the influence of the sympathy which the poor and the unfortunate naturally excite, that the impartial course of justice, and the severe duties of the lawgiver should in some degree be disturbed. One of the objects of the Constitution of the United States was to establish justice; and this it has done by the admirable distribution of its powers, and the checks which it has placed on the local legislation of the States. These checks have already, in their operation, essentially contributed to the protection of the rights of property."

¹ *Johnson v. Commonwealth*, 7 Dana, (Ky.) R. 342.

² *State v. Berry*, 2 Harrison, (N. J.) R. 139.

first day of October, in each and every year. For eighteen years after the passage of this act, the officers of the bank had paid the tax specified, but charged it against the whole corporation, instead of the private stockholders, whereby the stock, holden by the State, was made to pay a part of said tax. Whereupon an information was filed against the bank, to recover the amount of taxes which had thus been borne by the State stock, and to have the same deducted out of, or charged upon the stock of private holders, when it was held, (one judge dissenting,) that by a proper construction of the above recited clause, taken in connexion with other parts of the charter, the tax was not payable out of the profits as such, declared to each individual; that it was not payable out of the other separate estate of the holder; that it was not payable out of the separate stock holden, because that could not be reached by the collecting officers; because, if reached through the corporation, it would render the shares of unequal value, diminish the capital, and be a *fraud on purchasers*; that it was payable at all events, every year, and that therefore, for the above reasons, it was payable out of the common funds in the hands of the officers, as such, whether those funds consisted of capital or profit.¹

§ 5. The question, whether one or more of the States could, by taxation control, or indirectly contravene the measures of the government of the United States, was fully and deliberately settled in the case of *M'Culloch v. The State of Maryland*.² In this case the State had imposed a tax upon the Branch Bank of the United States, which was therein established; and, assuming the bank to be constitutionally created, the question arose on the constitutionality of the State tax. The decision of the court was, that no State government had a right to tax any of the constitutional powers, nor to control, nor to fetter with restrictions

¹ Attorney General *v.* Bank of Newbern, 1 Dev. & Bat. (N. C.) Eq. R. 216.

² 4 Wheaton, R. 316.

any law of Congress, which was passed to carry into effect the powers vested in the national government.¹

We deem it improper to pass over this important decision of the United States Supreme Court, without offering to our readers the notice which has been taken of it, and the manner in which it has been stated, by one of our most enlightened constitutional lawyers ; we mean the ex-chancellor of New York, Kent.² In the first volume of his "Commentaries," and in the chapter in which he ably and fully treats of the constitutional restrictions on the powers of the several States, he has devoted one or two pages to the decision above referred to, which we here introduce.

"To define and settle the bounds of the restriction of the power of taxation in the States, and especially when that restriction was deduced from the implied powers of the general government, was a great and difficult undertaking ; but it appears to have been, in this instance, most wisely and most successfully performed. It was declared by the court, that it was not to be denied, that the power of taxation, was to be concurrently exercised by the two governments ; but such was the paramount character of the constitution of the United States, that it had a capacity to withdraw any subject from the action even of this power, and it might restrain a State from any exercise of it, which may be incompatible with, and repugnant to, the constitutional laws of the Union. The great principle that governed the case was, that the constitution and the laws made in pursuance thereof were supreme, and that they controlled the constitution and laws of the respective States, and could not be controlled by them. It was of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their influence. A supreme power must control every other pow-

¹ As to the power of Congress to create corporations, see ante, p. 46, § 4.

² All questions of corporation law, which grow out of the peculiar nature of our government, and which involve questions of constitutional law, will justify, in a treatise of this sort, copious extracts from the opinions of our best constitutional lawyers.

er which is repugnant to it. The right of taxation in the States extends to all subjects over which its sovereign power extends, and no further. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission ; but it does not extend to those means which are employed by Congress to carry into execution their constitutional powers. The power of State taxation is to be measured by the extent of the State sovereignty, and this leaves to a State the command of all its resources, and the unimpaired power of taxing the people and property of the State. But it places beyond the reach of State power all those powers conferred on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. This principle relieves from clashing sovereignty ; from interfering powers ; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up ; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. The power to tax would involve the power to destroy, and the power to destroy might defeat and render useless the power to create. There would be a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, was declared to be supreme over that which exerts the control. If the right of the States to tax the means employed by the general government did really exist, then the declaration, that the constitution and the laws made in pursuance thereof should be the supreme law of the land, would be empty and unmeaning declamation. If the States might tax one instrument employed by the government in the execution of its powers, they might tax every other instrument. They might tax the mail ; they might tax the mint ; they might tax the papers of the custom house ; they might tax judicial process ; they might tax all the means employed by the government to an excess, which would defeat all the ends of government.

“ The claim of the States to tax the Bank of the United States was thus denied and shown to be fallacious ; and that there was a

manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve the institution of the Branch Bank. A tax on the operations of the bank was a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution, and was consequently unconstitutional. A case could not be selected from the decisions of the Supreme Court of the United States, superior to this one of *M'Culloch and the State of Maryland*, for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court, and an undue assertion of State power overruled and defeated.

“ But the court were careful to declare that their decision was to be received with this qualification ; that the States were not deprived of any resources of taxation which they originally possessed ; and that the restriction did not extend to a tax paid by the real property of the bank, in common with the real property within the State ; nor to a tax imposed upon the interest which the citizens of Maryland might hold in that institution in common with other property of the same description throughout the State.

“ The decision pronounced in this case against the validity of the Maryland tax, was made on the 7th of March, 1819, and it was on the 7th of February preceding, that the legislature of the State of Ohio imposed a similar tax, to the amount of 50,000 dollars annually, on the Branch Bank of the United States established in that State. Notwithstanding this decision, the officers of the State of Ohio proceeded to levy the tax, and that act, brought up before the Supreme Court a renewed discussion and consideration of the legality of such a tax.¹ It was attempted to withdraw this case from the influence and authority of the former decision, by the suggestion, that the Bank of the United States was a mere private corporation engaged in its own business, with its own views, and that its great end and principle object were private trade and private profit. It was admitted, that if that were the case, the bank would be subject to the taxing power of the State, as any individual would be. But it was not the case.

¹ *Osborn v. Bank of the United States*, 9 Wheat. R. 738.

The bank was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. It was not a private, but a public corporation, created for public and national purposes, and as an instrument necessary and proper for carrying into effect the powers vested in the government of the United States. The business of lending and dealing in money for private purposes was an incidental circumstance, and not the primary object; and the bank was endowed with this faculty in order to enable it to effect the great public ends of the institution, and without which faculty and business the bank would want a capacity to perform its public functions. And if the trade of the bank was essential to its character as a machine for the fiscal operations of the government, that trade must be exempt from State control, and a tax upon that trade bears upon the whole machine, and was, consequently, inadmissible, and repugnant to the constitution."

CHAPTER XIV.

OF THE CORPORATE MEETINGS, AND OF THE CONCURRENCE
NECESSARY TO DO CORPORATE ACTS.

§ 1. THE rule applicable to municipal corporations, viz. that all corporate affairs must be transacted at an assembly convened upon due notice, at a proper time and place, consisting of the proper number of persons, the proper officers, classes, &c.,¹ will in general apply to private corporations; though as we have seen, in some private corporations, the body may be bound by the acts of officers and authorized agents in affairs relating to its ordinary business.² The presumption is, that every member knows what days and times are appointed by the charter, by-laws, or by usage for the transaction of particular business; and therefore no notice is requisite for assembling to transact the business specially allotted for such days. There is in most private corporations a particular day appointed for the election of officers; and when the day is thus appointed for an election, no particular notice is required.³ Neither, as we apprehend, if a particular day is appointed in each year (as is often the case in charters to private corporations in the United States) for the transaction of all business, is a notice required of the particular business which is to be done.

§ 2. Although when a day certain is appointed for a particular business, no notice is necessary when that alone is to be transacted, or the mere ordinary affairs of the corporation are to be acted upon;

¹ Willcock on Mun. Corpor. 42.

² Ante, Chapters relating to Common Seal, Contracts and Agents.

³ Willcock, ut sup. *Rex v. Hill*, 4 B & C. 441, 443; *Rex v. Carmathen*, 4 M. & S. 702.

yet when the intention is to do other acts of importance, a notice is required. The election or motion of an officer, a by-law, or any act of similar importance, on any day, not expressly set apart for that particular transaction, is illegal and void.¹ When a particular notice is required, it must be given to every member who has a right to vote, whether the act is to be done by a body consisting of all the definite classes, or of one of them only.² And, according to a dictum of Lord Kenyon, similar notice must be given to every member of an "indefinite" body, who has a right to vote, as in those cases where the incidental powers of the corporation are not taken away by charter or by-law, but are exercised by the body at large.³

Where the charter declares that the election of directors shall be had in the manner prescribed in the by-laws of the company, and the by-laws fix a time and place for the election of directors, and require notice of the same, but omit to specify the length of notice and the mode of giving it, notice must be given for the time and in the manner prescribed by the general statute law in relation to corporations.⁴

§ 3. The summons must be issued by order of some one who has authority to assemble the corporation; though the want of authority in such case may be waived by the presence and consent of all who have a right to vote.⁵ The notice must be personally served upon every resident member, or left at his house. In the Supreme Court of Connecticut, in a case, in which it was insisted that a meeting of the Middletown Manufacturing Company was illegal, Daggett, J., who gave the opinion of the court observed; "It is very clear that a meeting of the stockholders, constituted as this was, could do no acts binding on the company. Though a meeting regularly warned would

¹ Willcock, *ut sup.* *Rex v. Liverpool*, 2 Burr. 734; *Rex v. Doncaster*, 2 Burr. 744; *Rex v. Theodorick*, 8 East, 545. And see *Bank of Chester v. Allen*, 11 Vermont R. 302.

² *Ibid.* and *Rex v. May*, 5 Burr. 2682.

³ *Rex v. Faversham*, 8 T. R. 356.

⁴ *Long Island &c. Rail Road Co. (Matter of)* 10 Wend. (N. Y.) R. 37.

⁵ *Rex v. Gaborian*, 11 East, 86, n.; *Rex v. Hill*, 4 B. & C. 441.

be competent to do any act within their chartered powers, by a bare majority ; yet if not thus warned, the act must be void. *If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given ; and this in such a case would be indispensable.*"¹ In case of his temporary absence, the notice must be left with the member's family, or at his last place of abode. It is no sufficient reason for omitting to summon a member, that it was supposed that he was without the reach of summons ; for to support the validity of corporate acts, each member must be actually summoned. Hence a mere order to summon all the members is not sufficient, and if it were, incorporators under this pretence might be taken by surprise.²

The rules just stated may not in every particular be equally applicable to all private corporations. In moneyed institutions, for instance, the mere owning of shares in the stock of the corporation gives a right of voting ; and it would be singular if when members of such institutions are absent, the attorney, whom they may have appointed to attend to the management of their property and concerns generally, could not represent them at a meeting of the corporation. In such cases, therefore, it seems proper that the authorized agents and attorneys of absent members should be summoned.³

A meeting of the directors of a bank in New Haven, called by the cashier by direction of the president, who was then in New York, by personal notice to the directors in New Haven, without specifying in such notice the object of the meeting, was held to be a legal meeting for the transaction of ordinary business.⁴

¹ *Stow v. Wise*, 7 Conn. R. 219 ; *Savings Bank v. Davis*, 8 Ib. 191 ; *Bethany v. Sperry*, 10 Ib. 200.

² *Willcock on Mun. Cor.* 445 ; *Kynaston v. Shrewsbury*, 2 Str. 1051.

³ See *State v. Tudor*, 5 Day, R. 229. And see also what has been said respecting the right to vote by *proxy*, ante p. 75, 76. See *Campbell v. Pultney*, 6 Gill & Johns. in Court of Appeals, (Md.) 94, and the matter of the Mohawk Railroad, &c. Co. 19 Wend. (N. Y.) R. 135 ; *Ex parte Barker*, 6 Wend. (N. Y.) 509.

⁴ *Savings Bank v. Davis*, 8 Conn. R. 191.

§ 4. In order to guard against and prevent surprise, the notice must be given a reasonable time before the hour of meeting ; and what is a reasonable time, of course, depends upon the circumstances of the case. If it has been usual to give the notice a certain time before the hour of assembling, that interval will at least be required ; but if it does not afford a sufficient opportunity to those who wish to attend, usage will not justify a practice thus unreasonable.¹

It is unnecessary that the notice should be in writing ; and it seems that if the members are fully informed by a parol, or any other warning, that there is to be a meeting, it is enough. Much of course will depend upon custom and usage ; and it has been said, that if a bell, which may be heard throughout the borough, is used for no other purpose than that of convening an assembly for the particular object of elections, it may perhaps be considered, that sufficient notice is given by ringing it at a certain usual and convenient time before the body is to meet.²

In general the notice should state the time at which the members are to assemble, and also the place, if different from the place where meetings are usually held.³ It is not generally deemed necessary, however, to state what business is to be transacted, when it relates only to the ordinary affairs of the corporation. But if there is to be an election, or amotion, or the passage of a by-law, or a disposition of property, some intimation should be given ; for such members as may not think their attendance necessary for the usual routine of business will, perhaps, feel it their duty to attend upon such occasions, in order to preserve the interests and good order of the body corporate, and

¹ *Rex v. Hill*, 4 B. & C. 442; *Rex v. May*, 5 Burr. 2682. Where the customary summons is sufficient for the residents, as if it require a notice of twenty-four hours, for the election of a capital burgess, in granting a mandamus, the court will not, on the application of the defendant, appoint a particular time for executing the writ, nor require a notice of six days to be given contrary to the constitution of the place, and for the convenience of one party. *Ibid.* and *Willcock*, ut sup.

² *Willcock* ut sup. 46; *Rex v. Hill*, 4 B. & C. 442.

³ *Ibid.*; *Rex v. Theodorick*, 8 East, 546.

the fundamental principles of its institution.¹ It was said, that when an amotion is intended, the notice should not only mention the purpose of the meeting, but state the name of the person to be proceeded against, and the offence with which he is charged, that the corporators may come better prepared for the discussion.² But Mr. Willcock apprehends that a more general statement, if it answers the purposes of justice, will be sufficient.

§ 5. If the members be duly assembled, they may unanimously agree to waive the necessity of notice, and proceed to business ; but if any one person having a right to vote is absent, or refuses his consent, all extraordinary proceedings are illegal.³ But if the charter requires a special notice, it cannot be dispensed with, even by unanimous consent.⁴ When some of those who have a right to vote are assembled upon due notice, and all the others who have a right to notice attend without it, and agree to enter upon the proceedings, it is a legal waiver of the notice, and the act of the assembly cannot be impeached for the omission of it.⁵

The privilege of voting may be waived by those present. When a question is put, by the established organ silence is acquiescence, because each member is supposed to have assented beforehand to the process pre-established to ascertain the general will ; but this rule of implied assent is inapplicable to a measure, which is essentially revolutionary, and based on no pre-established process of ascertainment whatever. And to affect silent members with the implication of assent, the ground of the question, and the nature of

¹ Ibid. To a neglect of this notice alone can be attributed those unconstitutional innovations which have crept into corporations, by which the body at large has in most cases been stripped of their incidental rights, and the power of election, amotion, and disposing of corporate property, vested in them by their incorporation, have been arrogated to themselves by the select classes, until at length the antiquity of the usurpation has given them a semblance of right. Willcock, 46, 47.

² *Rex v. Liverpool*, 2 Burr. 375.

³ *Rex v. Theodorick*, 8 East, 543 ; *Rex v. Gaborian*, 11 East, 86, n., 87, n.

⁴ *Rex v. Theodorick*, ut sup.

⁵ *Rex v. Oxford*, Palm. 453.

the question must be so explicitly put before them, as to prevent mis-conception or mistake.¹

§ 6. If there is no proper place established for the transaction of the regular business of the corporation, some place in particular should be appointed in the notice. All acts done at an unusual place by a municipal corporation carry the appearance of contrivance, secrecy, and fraud. A meeting of a municipal corporation held at an inn, instead of the town hall, particularly when partaking of an entertainment, has been deemed not a proper corporate assembly, though all the members were present.² But this was probably on the ground, that the conduct of the members at such a place, and under such circumstances, would have little of the deliberation which should attend the discharge of offices of confidence and authority. It is certainly essential in all corporations, that whenever the meeting is held at an unusual place, intimation of that circumstance should be contained in the notice; otherwise, much fraud may be practised and great injustice committed.³

We have already had occasion to remark, that private corporations are not generally as much restricted in the conduct of their affairs in regard to locality, as cities and other political and municipal corporations.⁴ The former may with propriety hold their meetings out of the town in which they are established, or transact their ordinary business, provided the place of meeting is not unreasonable, and has been appointed with no sinister and improper design, and the members are duly notified. Indeed it has been expressly decided, that the directors of a manufacturing company incorporated by the legislature of Connecticut, who were authorized to appoint officers, establish by-laws, &c., might meet in the State of New York, and there appoint a secretary. In this case, the manufactory was located in the town of Greenwich,

¹ *Commonwealth v. Green*, 4 Whart. (Penn.) R. 531.

² *Rex v. May*, 5 Burr. 2682.

³ See *Willcock on Mun. Corpor.* 51.

⁴ *Ante*, p. 63, 64.

bordering upon New York. The court were clearly of opinion, that the legislature of Connecticut did not mean it to be understood, by implication, that the directors might sit and vote on one side of the line, but if they went on the other, the proceedings should be void.¹

Where according to the laws and usages of a society, their meetings for the transaction of business are opened by a presiding officer, who holds his office for a fixed term, and no meeting is considered duly organized unless opened by him, and such officer is prevented by the violence of members of the association from discharging his duty at the accustomed place of meeting, he and such of the society as think proper to accompany may retire to some convenient place adjacent, and there open the meeting ; and their acts and doings will be obligatory upon the society, although those who thus withdraw are a minority of the members of the society ; it being a principle of the *common law*, that where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting of the society constitute a body to transact business.²

It is a common provision in the charters of private corporations in the United States, that the meeting shall be held at a certain place, or at such other place as the company of the directors may appoint.

§ 7. Corporations are subject to the emphatically republican principle, (supposing the charter to be silent,) that the whole are bound by the acts of the *majority*, when those acts are conformable to the articles of the constitution. The general rule upon this subject has been thus very correctly laid down by Gibson, J., in the Supreme Court of Pennsylvania ; “ The fundamental principle of every association for the purposes of self-government is, that no one shall be bound except with his own consent expressed by himself or his representatives ; but actual assent is immaterial, the assent of the majority being the assent of all ; and this is not only constructively but actually true ; for that the will of the ma-

¹ M'Call v. Byram Man. Co., 6 Conn. R. 428.

² Field v. Field, 9 Wend. (N. Y.) R. 394.

jority shall in all cases be taken for the will of the whole, is an implied but essential stipulation in every compact of the sort ; so that the individual who becomes a member assents, beforehand, to all measures that shall be sanctioned by a majority of the voices."¹

"It seems," says Mr. Kyd, "to the first suggestion of reason, that an act done by a simple majority of a collective body of men, which concerns the common interest, should be binding on the whole ;" and this he adds, "is the principle of the rule adopted by the common law of England, with respect to aggregate corporations."² What is meant by the majority, whether it means the concurrence of the major part of those who happen to be present at a regular corporate meeting, or whether it means a concurrence of the majority of the major part of the whole body, we shall next proceed to consider.

§ 8. There is this distinction between a corporate act to be done by a definite number of persons, and one to be performed by an indefinite number. In the first case, it is to be observed, that a majority is necessary to constitute a quorum, and that no act can be done unless a majority be present ; in the latter, a majority of any number of those which appear may act. Thus, the act incorporating the Utica Insurance Company provided, that the affairs and concerns of the corporation should be managed by *nine directors*. At a meeting purporting to be a meeting of the president and directors of the company, but at which no one was present beside the president and one of the directors, the president being also a director, they appointed themselves and another of the directors to act as inspectors of elections. The question was, whether those three were thus authorized to preside at an election. It was said by the court ; "Whether we are to regard this as an electing power, or as part of the business of the direct-

¹ St. Mary's Church in Philadelphia, 7 Serg. & Rawle, (Penn.) R. 517.

² 1 Kyd, 422; and see 2 Kent, Comm. 236. In general it would be the understanding of a plain man, that when a body of persons is to do an act, a majority of that body would bind the rest. Per Lawrence, J., in Withnell v. Gartham, 6 T. R. 388; and see case of Wadham College, Cowp. 377; Rex v. Beeston, 3 T. R. 592. See Field v. Field, 9 Wend. (N. Y.) R. 394.

ors in their regulations of the election ; and (among other regulations) a designation of the persons who shall receive and canvass the votes ; in either view, we think there must be at least a *majority of the directors* present, to constitute a board. We do not understand the words, "a majority of the directors present shall be competent, &c.," as amounting to a declaration, that a minority, however, small may decide. It leaves the number competent to a quorum, to be determined by the rules of the common law, which in no case of *this kind* is satisfied with less than a *majority*."¹

It is very clearly the opinion of the court in the above case, as appears by the quotation just offered, that where a corporate act is to be done by a *definite* number of persons, a majority, at least, must be present ; and the court distinguished such a case from the case of an *indefinite* number. In the latter case the court admit that a majority of those present are competent to act, however few in number. The distinction certainly seems to be warranted by the authorities, though, according to Mr. Kyd's construction, it is not. That author lays down the following proposition ; "At common law, independently of any specific constitution, when the power of acting is entrusted to any specific number, *whether definite or indefinite*, any number of the whole body, however mi-

¹ Ex parte Willcock, 7 Cowen, (N. Y.) R. 402. See also *Rex v. Whitaker*, 9 B. & C. 648. In this case three assessors were appointed under the act for draining, but only two signed the appointment, though the third was present at all their meetings. Held, that the concurrence and signature of the majority was sufficient. Lord Tenterden, after consulting with the other judges, added, "Perhaps it may not be necessary that all should meet ; certainly a majority must meet. In this case all the three had met. Where it is granted by charter, that a corporation shall have so many aldermen and so many capital burgesses, and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by the "mayor and aldermen and other capital burgesses then surviving or remaining, or the greater part of them ; the election must be made by a majority of the full numbers of aldermen and of capital burgesses ; a mere majority of members of both bodies, who happen to survive, is not sufficient." *Rex v. May*, 4 Barn. & Adol. 843, Per Lord Denman. "There may be distinctions drawn between this case and *Rex v. Devonshire*, but they are the same in principle."

nute, is sufficient to form a legal assembly, if all be properly summoned to attend." He instances the House of Commons composed of 558 members, and says 40 form a house ; and he then adds, "any number less than 40 would do so too, *were there not a standing order, that no business shall be agitated unless that number be present.*" Now we are inclined to think, that if there was no such standing order, it would be necessary that a majority of the 558 should convene.¹ In this opinion we are certainly sustained by the before mentioned construction of the Supreme Court of New York ; and, we are also sustained, in the opinion, by the authorities in relation to corporations composed of several classes, or integral parts, which we shall next consider.

¹ In a late case in England, where commissioners for building and enlarging churches, appointed pursuant to statute twenty six persons to be a select vestry, for the care and management of a church ; it was held, that in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the members (*viz.* fourteen) named in the appointment ; and therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal. *Blacket v. Blizard*, 9 B. & C. 851.

Where an authority is confided to several persons for a *private* purpose, *all* must join in the act. A controversy between G. and M. was submitted to five arbitrators ; and the submission did not provide that a less number than the whole might make an award. All the arbitrators met, and heard the proofs and allegations of the parties, but four only agreed on the award made. Whether the award was binding, was the question before the court. No case was cited where the question had been directly decided. The court were, however, satisfied, that, as a submission to arbitrators is a delegation of power, *for a mere private purpose*, it is necessary that all the arbitrators should concur in the award, unless otherwise provided by the parties. Thompson, J., who gave the opinion, said ; "In matters of public concern, a different rule seems to prevail ; there the voice of the majority shall govern." *Green v. Miller*, 6 Johns. (N. Y.) R. 38. In the case of *Grindely v. Barker*, (1 Bos. & Pull. 236,) Chief J. Eyre says ; "It is now pretty well established, that where a number of persons are entrusted with power, *not of mere private confidence*, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. See *Orvis v. Thompson*, 1 Johns. (N. Y.) R. 500 ; *Rex v. Courtenay*, 9 East, 246.

§ 9. We have before stated, that aggregate corporations are sometimes composed of several distinct parts or classes of persons, which are called integral parts ;¹ neither of which is a distinct corporation. According to the authorities afforded by the English books relating to municipal corporations, there must be present at a corporate assembly, (besides the president,) a majority of each integral part, if composed of a *definite* number, and not merely a majority of the surviving or existing members of each class. Indeed, if there be not a surviving majority of the constitutional numbers, no corporate assembly, say those authorities, can be formed, and the functions of every meeting in which that class ought to participate are suspended ; and according to some authorities, the corporation is even dissolved.² The rule, that a majority of every integral part of a corporation, consisting of a definite number, must be present, was recognised in the case of *St. Mary's Church* in Pennsylvania, wherein it was decided, that in corporations, where there are different classes, the majority of each class must consent before the charter can be altered, unless there is a provision in the charter respecting alterations. In this case, Duncan, J. lays down the law as follows ; “ When legally assembled, the majority of voices govern ; but every integral part must be present at a corporate assembly by a *majority at least* of its proper members, though the major part of all present, when assembled, are competent to do a corporate act.”³

When a corporation consists of several integral parts, one of which is *indefinite*, if any number of persons composing the latter, however small, are present after having been duly summoned, it is sufficient. The distinction is between a definite and an indefinite number. In the former case a majority must be present ; whereas

¹ Ante, p. 58.

² *Rex v. Lathrop*, 1 W. Bla. 471 ; *Rex v. Bellringer*, 4 T. R. 823 ; *Rex v. Miller*, 6 T. R. 278 ; *Rex v. Morris*, 4 East, 26 ; *Rex v. Thornton* 4 East, 307 ; *Rex v. Devonshire*, 1 B. & C. 614 ; *Rex v. Hill*, 4 B. & C. 441 ; Willcock on Mun. Corpor. 62. And see Mr. Cowen's note to *Ex parte Willcock*, 7 Cowen, (N. Y.) R. 410.

³ *St Mary's Church* in Philadelphia, 7 Serg. & Rawle, (Penn.) R. 517.

in the latter a majority of those present may act, whether a majority of the whole body or not.¹

§ 10. What we have said respecting the number required to be present in different corporations in order to do corporate acts, is confined to corporations whose charter or constitution is silent upon the subject. The rules we have stated as being the common law may be, and frequently are superseded by the express provisions of the charter; and there have been provisions of this nature introduced into charters, that have been the source of much discussion and controversy.² It was considered in England at one time, that the phrase "for the time being" referred to the state of the corporation from time to time, and that when an act was to be done by a definite class or the majority of them for "the time being," it required only the presence of the majority of the surviving members at that time, although less than the constitutional number. The effect of this would be, that if the corporation ought to consist of twelve aldermen and twelve burgesses, an act, required to be done by a majority of each class for "the time being," might be done by two aldermen and two burgesses, if the number happened to be reduced to three members of each class. The law on this point is now, however, well settled in England; and the words "for the time being" are construed, (rightly says Mr. Willcock,) to apply to the persons who shall from time to time be the members of such classes; so that such an act cannot be done by less than seven aldermen and seven burgesses, although at that time they are all who survive.³ And it is immaterial into what combination of words this phrase is introduced, for a majority of the constitutional number of each definite class is requisite, if the charter direct the act to be done by the mayor, aldermen, bailiffs, capital and other burgesses, and inhabitants "for the time

¹ Willcock on Mun. Corpor. 66; *The King v. Whitaker*, 9 B. & C. 648.

² See note to *Ex parte Rogers*, 7 Cowen, 530.

³ Willcock on Mun. Corpor. 63; *Rex v. Morris*, 4 East, 26; *Rex v. Bellringer*, 4 T. R. 823; *Rex v. Bower*, 2 D. & R. 770; *Rex v. Williams*, 3 D. & R. 81; S. C. 1 B. & C. 614.

being " assembled, or the greater part of them by the majority of voices " of them so assembled." ¹

The words " surviving and remaining " might, says Mr. Willcock, be imagined to refer to the existing number of members in a definite class, and to derive greater force from the presence of a majority of those surviving and remaining being required at elections to supply vacancies in the same class, when from necessity it must consist of at least one less than the constitutional number. But the implication from this even is not so strong as to induce the courts to admit a violation of the rule ; and therefore, if there ought to be twelve capital burgesses, and the charter directs, that when a capital burgess is dead or removed, the other capital burgesses, " at that time surviving and remaining," or the greater part " of the same," shall elect another to be a capital burgess, the election is void, unless seven capital burgesses be present. ²

The construction of a charter may sometimes require the assembly to consist of more than a simple majority of the select class ; for it was held, that when the corporation consisted of a mayor and eleven aldermen, and the charter directed that two aldermen should be nominated, of whom one should be elected by " the *then residue* of the aldermen, or the major part of them," there must at least be present five aldermen (the majority of nine the residue of the constitutional number after two had been nominated) besides the mayor and the two nominees, making altogether seven aldermen instead of a simple majority of six. ³ But perhaps, says Mr. Willcock, it is not necessary, that the nominees should be present, and the mayor and five, or at least six, aldermen may proceed to an election, if they nominate two of those who are absent. ⁴ But if the charter plainly and explicitly empower a less number to make an election, the court cannot assume to alter the

¹ *Rex v. Bower*, 2 D. & R. 770 ; S. C. 1 B. & C. 498.

² *Rex v. Devonshire*, 1 B. & C. 617 ; S. C. 3 D. & R. 81.

³ *Rex v. Smith*, 2 M. & S. 579.

⁴ Willcock on Mun. Corpor. 65.

constitution ;¹ and so if the charter require a greater number than the majority.²

The words, "a majority of the directors present shall be competent, &c.," in the 15th section of the act incorporating the Utica Insurance Company, were considered by the Supreme Court of the State of New York as not amounting to a declaration, that a minority, however small, might decide ; and that it left the number competent to form a quorum, to be determined by the rules of the common law.³ In *Rex v. Beeston*,⁴ a statute had authorized the church wardens and overseers of the poor to make certain contracts ; they had all joined, with the exception of the defendant, one of the overseers, who refused to join, and made a contract, and the money was in the defendant's hands to be paid upon it. On a motion for a mandamus to compel him to pay, he insisted, that he was not bound, inasmuch as the *statute* required the contract to be made by the church wardens and overseers, without saying, "*or a majority* ;" and that, therefore, they should all concur ; and that he having dissented, the contract was void. But the motion was granted. It has been decided in New York, that when the charter prescribes, that every act of the corporation shall be done by the president and *at least four directors*, the president alone could not legally accept an abandonment.⁵ The agents of a corporation can never bind it, if they do not act pursuant to the requisites of the charter or incorporating act.⁶

§ 11. In the case of *King v. Norris*,⁷ at one of the assemblies of the corporation of Newcastle, (where the *presence* of the mayor was necessary,) as soon as the lists of certain persons were

¹ *Rex v. Hoyte*, 6 T. R. 432 ; *Rex v. Richardson*, 1 Burr. 541.

² *Palmer v. Doney*, 2 Johns. (N. Y.) C. R. 346.

³ *Ex parte Willcocks*, 7 Cowen, (N. Y.) R. 409.

⁴ 3 T. R. 492.

⁵ *Beatty v. the Marine Insurance Company*, 2 Johns. (N. Y.) R. 109.

⁶ *Head and Amory v. Providence Insurance Co.* 2 Cranch, R. 266 ; and see Chapter relating to the power of agents to make contracts.

⁷ 1 Barnard, R. 385.

given in as candidates for freemen, and before they were admitted to their freedom, the mayor dissolved the assembly, who, notwithstanding, proceeded to admit them. The Court said, "It is very true, that no new business can be proposed in the absence of such officer; but the assembly has always the right to proceed in the business *begun* when he was present." This case was cited, (and apparently with approbation,) in the Supreme Court of Pennsylvania by Duncan, J., in a case where the trustees of a corporation consisted of three *clerical* and eight *lay* members. The decision was, that if one of the clerical members be *excluded* from the board by a resolution of the lay members, *without authority*, the proceedings in the absence of such member were unlawful. But the opinion of the court in some degree implies, that if the member had *voluntarily* absented himself, after the business of the meeting had commenced, no such conclusion could be drawn.¹ The English authorities, however, since the case of *King v. Norris*, have been strict in requiring the *actual* presence of all the integral parts of a corporation. So strict have they been, that in several instances where a mayor has deserted his post, after business had begun, when he perceived that the corporation were disposed to act against him, they have adjudged the proceedings, in his absence, void. Thus, where it appeared by the charter, that the mayor, aldermen, and burgesses of the borough of S., or the major part of them, were on the charter day, to assemble in the Guildhall; when the *mayor and aldermen*, or the major part of them were to nominate and put in election for mayor two of the aldermen; and they were there to continue together, or in due manner adjourn, until the mayor and the other integral parts should have elected one of the two aldermen nominated for a year; being thus convened, B., the mayor, and two aldermen, nominated the two latter for mayor; but the other aldermen, a majority, nominating two out of their number, the mayor and his two nominees quitted the Guildhall. The other

¹ Case of the Corporation of St Mary's Church in Philadelphia, 7 S. & Rawle, (Penn.) R. 517; See also, Cowen's note to the case of *Ex parte Rogers*, 7 Cowen, (N. Y.) R. 533.

aldermen, with the burgesses, proceeded to an election of those nominated by the four. On a rule to show cause against B., the mayor, why a mandamus should not issue, commanding him to swear his successor into office, the above case of *King v. Norris* was, at first, overlooked. On examination, afterwards, its authority appeared to the court somewhat questionable ; and the election passed as irregular, for want of the actual presence of the old mayor. The decision of the court was upon the ground, that the mayor was an *integral part* of the corporation.¹ In a still later case, the mayor, burgesses, and commonalty of C. were to elect a mayor annually. They being assembled at a quarter before one, P. M., the mayor, contrary to the advice of the recorder and the sense of the burgesses, proposed to adjourn till 3, P. M. He did not do so however, and in his presence, one E. was suddenly proposed and seconded as a candidate, before the mayor left the place ; but he departed before E. was declared duly elected, though this was done immediately after his departure by the burgesses and commonalty. The King's Bench held, that the election was void for the absence of the presiding officer, an *integral part* of the corporation.²

It was held in *Ex parte Rogers* in New York, that where a statute or charter requires, that a certain number of persons shall be present at the consummation of any act, they must all be so present ; and the act is not good, though it be begun while all are present, if one of them depart, though wrongfully, before its consummation.³ The learned reporter, in a note to the case just cited, observes ; " Where a public act is to be done, by three or more commissioners appointed in a statute, and a competent number have met and conferred, though they separate, and then a majority do the act, without the presence of the others, the act seems good in consideration of law ; though it is other-

¹ *King v. Buller*, 8 East, 388 ; See also note to this case.

² *King v. Williams*, 2 M. & S. 141 ; Dampier, J. relied on the case of *King v. Buller*, (supra.)

³ *Ex parte Rogers*, 7 Cowen, (N. Y.) R. 326.

wise where there is a positive statute or charter, requiring, that a full board shall be present at the consummation.”¹

§ 12. Acts purporting to be done by corporations, which relate to the constitution and the rules of government of the body corporate, are not to be considered as having received a legal concurrence, merely because they appear under the corporate seal ; and the court have authority to inquire in such cases by what authority the seal was affixed. Thus it was held, in the case of St. Mary's Church in Philadelphia, that proposed of amendments the charter, though authenticated by the seal, were not regarded as conclusive evidence, that the proposition was the legal act of the corporation. The C. J. in this case (Tilghman) in delivering his opinion remarked as follows ; “ Is the court bound to consider the proposal for alteration of the charter as the act of the corporation, because it is presented under the corporate seal ; or may it look beyond the seal, and inquire in what manner, and by what authority it was affixed ?

¹ The Reporter then cites the following case. — “ The statute of March 1st, 1788, (2 Greenleaf, 116, § 11, ch. 48, s 2,) declared, that no permit should be granted to retail spirituous liquor, unless three commissioners (a full board) should be *present at the granting thereof*. This provision came under consideration in Palmer, q. t. v. Doney, (2 John. Cas. 346,) which was an action of debt for several penalties alleged to be incurred by the defendant under the 10th section of the act for selling without a permit. The main question was, whether the permit was granted by a competent board. The supervisor and two justices (a full board) being met, the defendant applied to them for license. The supervisor decided against granting it ; whereupon the two justices retired into another room, and gave the license required. In this case, it is evident from the language of Lewis, C. J., who delivered the opinion of the court, that they considered the statute as substantially satisfied in its equity and spirit ; but they yielded to its strong letter ; expressly putting themselves on the positive *proviso*, that three commissioners *should be present*. This is a case which stands almost alone in our statute book ; and is evidently founded on the extreme jealousy of the legislature against the heedless multiplication of taverns. The provision is continued to this day, with the addition, that the supervisor of the town shall be one of the three who shall be present ; and that unless they are all actually present, the license shall be void. (1 R. L. 177. § 3)

Undoubtedly it may, and it ought. Suppose amendments should be voted at a meeting of the corporation, not lawfully convened, and some of the members who were absent should dissent. Suppose a meeting lawfully convened, and then the majority should force the minority to retire, after which they should pass a resolution for amendments. Suppose by the constitution of the corporation, a certain quorum should be required to do business, and a number less than the quorum should pass resolutions for amendment, and affix the seal. Or suppose the constitution provided, that the assent of certain members should be necessary, and the others proceeded to act without their assent. In all these cases, it is too clear to admit of argument, that the court would do flagrant injustice, if it suffered the seal to preclude an examination of the truth."¹ As the affixing the corporate seal is a mere ministerial act, the seal may be affixed to a contract by a less number than was competent to enter into the contract, provided it is done by the direction of a legal quorum. Thus, where the charter required a certain number of managers to constitute a quorum for the purpose of entering into contracts, a contract, to which the seal of the corporation was affixed by a less number than were competent to make the contract, was holden to be valid, provided it was done by the order of a legal quorum. If the seal, the court say, were in fact affixed by persons having no authority, it was matter for subsequent consideration by the jury.²

The books and minutes of a corporation, if there is nothing to raise a suspicion, that the corporate proceedings have been irregular, will of course be treated and referred to as evidence of the legality of the proceedings. And it has been held, that where the charter requires two-thirds to form a quorum, and it is stated on the minutes, that on due invitation the corporators met, and it is not usual to mention on the minutes the names or number of those present, it is *prima facie* evidence, that two-thirds did assemble.³

¹ Case of St. Mary's Church, 7 S. & Rawle, (Penn.) R. 530.

² President &c. of B. & D. Turn. Road v. Myers, 6 S. & R. (Penn.) R. 12.

³ Commonwealth v. Woelper, 3 S. & Rawle, (Penn.) R. 29.

In the case of *Grays v. Lynchburg and Salem Turn. Co.*, in Virginia, it was objected, that the entry in the book did not show that the meeting consisted of "a number of persons, entitled to a majority of all the votes, which could be given on all the shares subscribed," which the law requires. The court said; "The entry certainly has not followed the words of the law; and if it intended to express the same idea, it has done it a little awkwardly; yet that it did so intend, we are strongly inclined to think. It must have been apparent to every member, that the law required a majority of the stock to be represented in the first meeting; and to that end, directed, that those who first met, should adjourn from time to time, until such majority should attend. We can conceive no motive for the departing from the law. The meeting consisted of partners in the firm, all interested in putting the institution legally into operation. They did organize it, and it has gone on ever since, without objection, that we hear of. Under these circumstances, may we not fairly conclude, that the meeting was a legal one? That by the words "majority of the stockholders," the clerk meant such a majority as the law required, to wit, *holders of a majority of the stock*? We think this by no means a strained inference.¹

¹ *Grays v. Lynchburg and Salem Turn. Co.* 4 Rand. (Virg.) R. 578.

CHAPTER XV.

OF SUBSCRIPTIONS FOR CORPORATE STOCK ; AND OF THE
POWER OF THE CORPORATION TO MAKE AND RECOVER AS-
SESSMENTS ON THE SAME.

§ 1. THE meaning of the word "subscriber" received attention in a late case in England, in which an action was brought to recover the amount of two calls. The defendant had applied for eight shares in the intended capital of the Thames Tunnel Company, and the number of shares was set against his name, and he then gave a check for the deposit and took a receipt. He, however, never signed the contract under the act subsequently passed for incorporating the company, although a space was left opposite to his name for the purpose of his seal and signature. The court held that he was not liable ; for the word "subscriber," in the act, applied to those only who had *stipulated* to make a payment, and not merely to such as *had* made a payment.¹

In the case of the Bristol Canal Company, the action was an action of debt to recover from the defendant, as one of the proprietors of the Bristol and Taunton navigation, £270 in respect of twenty-seven shares in that navigation, for a call made, at the rate of £10 per share. The act of parliament incorporating the company was produced, and the defendant's name appeared in it as one of the original proprietors. His name also appeared on the register book as the proprietor of twenty-seven shares. The original paper, subscribed by the defendant, was not admitted in evidence for want of a stamp. Lord Ellenborough thought that the plaintiff might recover in respect of one share, because the defendant's name appeared in the act of parliament ; but he

¹ Thames Tunnel Company v. Sheldon, 6 B. & C. 341.

doubted, whether the register book could be given in evidence to show the further property in twenty-six shares ; and a verdict was taken for the plaintiff for £10 only, with leave to move to enter for £270. The rule being accordingly obtained, and cause shown against it, the act of parliament was referred to. By one section of the act it was provided, that on trial of any action against the owners of shares in the canal, it should only be necessary to prove that the defendant, at the time of making the call, was a proprietor of the share ; and that the call was in fact made, and that due notice according to the act was given. The section went on to declare, that the production by the principal clerk, or other officer of the company of the register book, &c. should be sufficient evidence. It was then said by Lord Ellenborough to be clear, that the register book ought to have been admitted as evidence of the defendant's property in the shares.¹

§ 2 The interest, acquired by subscribing for shares in the stock of an existing incorporated company, is a good consideration to support an action against a subscriber. It might well be inferred, from the principles of law, respecting promises and engagements in general, that a person, who becomes a stockholder of an incorporated company, by signing an agreement with other subscribers, by which they promise to pay the company a specific sum for every share set opposite their names, is liable in an action of *assumpsit* at the suit of the company. This point has moreover been expressly decided. In the case of the *Duchess Manufacturing Company v. Davis*, in the State of New York,² the court (referring as authority to *Union Turnpike Company v. Jenkins*,³ and *Goshen Turnpike Company v. Hurtin*)⁴ decided that the defendant, having undertaken to enter into a contract with the plaintiffs in their corporate name, thus admitted them to be a body politic ; and by his subscription for a certain

¹ *Bristol and Taunton Navigation Canal Company v. Amos*, 1 Maule & S. 569.

² 14 Johns. (N. Y.) R. 238 ; and see *U. Society v. Eagle Bank*, 7 Conn. R. 456 ; *Trustees, &c. v. Same*, *Ib.* 476.

³ 1 Caines, (N. Y.) R. 86.

⁴ 9 Johns. (N. Y.) R. 217.

number of shares, at a certain sum, he became liable for the amount of his subscription, on the principle that the maker of a promissory note is liable.¹

The same point was also adjudged in Massachusetts, in the case of *Chester Glass Company v. Dewey*.² The objection taken in this case was, that the written paper signed by the defendant was made before the company was incorporated, and was therefore a contract only with the individuals. But the answer given, and which the Court thought sufficient, was, that the act incorporated all who might afterwards associate, as well as those who had then been associated. The defendant, the Court said, signed the paper after the act of incorporation had passed; but that he must be taken to have signed it on the day it bore date. Secondly; it was insisted that the defendant could not be a member without a certificate of his share; it having been provided by the general act upon the subject, that certificates of the shares should issue to the stockholders. But the issuing of the certificates, the Court considered, was not essential to the existence of the corporation, and that the corporation might be compelled by a court of Chancery to give certificates. It was objected, thirdly, that the corporation had never been duly authorized under the statute, and that therefore no contract had been made with them, and that they had no right to maintain *assumpsit* to recover the amount of the subscription. The statute referred to required, that the first meeting should be called by a major part of the persons incorporated; and it appeared that one

¹ The case of *Goshen Turnpike Company v. Hurtin* was an action of *assumpsit* on a promissory note made by the defendant, by which he "promised to pay the plaintiffs 125 dollars for 5 shares of the capital stock of said corporation, in such manner and proportion, and at such time and place as the said plaintiffs should from time to time require." There was a general demurrer to the declaration, and joinder in demurrer. The court held, that the note set forth in the declaration was a good promissory note, within the statute of New York, (which is in substance, the 3 and 4 Anne,) though it had not the words "bearer" or "order." But the question which the parties had principally in view in the case was, whether an action would lie at all on promise by a turnpike stockholder to pay his instalments, and it was held in the affirmative.

² 16 Mass. R. 94; and see *Instone v. F. Bridge Co.*, 2 Bibb, (Ky.) R. 570.

King and one *Leister*, who were partners in trade, were named in the act of incorporation, and that to the advertisement for calling the meeting, the name of the firm was signed. The court said, that considering this as one signature, there was not a majority; though taking the names separately, there was. At any rate, they thought the objection could not be made by one of the company, after they had in fact been organized, and for several years transacted business, as a corporation; and that it would be right to consider the advertisement as signed by each of the partners, the one who actually signed, acting as agent for the others.

In a case in Maryland, where notice was required to be given of the time and place for receiving subscriptions for stock, it was held that the want of notice was no defence to one who did subscribe; the object of the notice being only to prevent a monopoly of the stock.¹ A person who subscribes before the existence of the corporation may afterwards raise a mutuality in his contract, and give efficiency to his subscription by concurring in obtaining, and by accepting the act of incorporation;² or by attending and voting at the corporate meetings. In an action for calls on shares possessed by the defendant, it appeared that the defendant had been one of the original subscribers, and had signed the following paper; "22 August, 1811. A list of subscribers to a fund for carrying into execution a plan for the improvement of the harbor of K., and making proper communications therewith, by a canal or railroads;" that an act of parliament was obtained in June, 1812; that the defendant had attended some of the meetings of the committee, and had voted and taken an active part in them; but had on one occasion expressed a wish to withdraw his name from the subscription, and his name was not therefore inserted in the act; that he had, nevertheless, in November, attended a meeting of the subscribers, and seconded a motion for the appointment of clerk; and subsequently made

¹ *Hagerstown Turn. Road Co. v. Creeger*, 5 Har. & Johns. (Md.) R. 122.

² *Phillips' Limerick Academy v. Davis*, 11 Mass. R. 116; and see *Hudersfield Canal Company v. Buckley*, 7 T. R. 36.

an irregular assignment of his shares to another subscriber. On this evidence, Wood, B., held that the defendant was not at liberty to withdraw his name without the consent of the other subscribers, and the plaintiff had a verdict. On a motion to set aside the verdict, the court held, as to the defendant's withdrawing from the speculation, that he could not discharge himself by any declaration to that effect, and that the committee was incompetent to consent to such regulations, and observed, that it could not be said to have been the intention of the legislature to have discharged the defendant, for that would have required an *express clause* excluding him *by name*. The words of the act were, "those who have subscribed or shall hereafter subscribe." It was considered, that the defendant, being within the terms of the act, would have been entitled to a share of the profits of the undertaking, as a proprietor; and that consequently he must be liable as such to the losses. Wherever there is an agreement, the court held, between several, one party cannot withdraw without the consent of the others, as in the case of creditors having agreed to take a composition, one cannot retract without the consent of all the rest.¹

And a subscriber will not be permitted to withdraw, and abandon his shares, without the consent of the corporation, unless expressly empowered so to do by the act of incorporation.²

In the case of *Farmington Academy v. Flint*, in Massachusetts, the trustees of that institution, after being incorporated, and becoming seized in trust of the land which the legislature had granted on the faith of the private funds raised by subscription,

¹ *Kidwelly Canal Co. v. Raby*, 2 Price's Ex. R. 93. Where the members of an incorporated religious society subscribed a written agreement with the trustees of the society, by which they individually engaged to pay to the trustees the sums set opposite their respective names, for raising a salary for the minister; it was held that this was a valid contract in law, and binding on the subscribers; and that it could not be dissolved but by mutual consent, nor cease to be obligatory until the minister ceased to render the service stipulated. *Religious Society v. Stone*, 7 Johns. (N. Y.) R. 112; and see also *Martyn v. Hynd*, Doug. 142; Cowp. 437; and *Taylor v. Gay*, 1 Sid. 409. See ante Chap. VIII. § 11.

² *Bordentown Turnp. Co. v. Imlay*, 1 Southard, (N. J.) R. 285.

proceeded to erect a building for the use of the institution. Flint being one of the trustees, *never having dissented* from any of their acts, and having, when called upon for payment, sent a man, who was a debtor of his, to work out a part of his subscription ; it was thought that the recognition of his promise, accompanied by a knowledge on his part that the expense was going on, authorized a recovery against him to the amount of his subscription, on the ground of *money paid, laid out, &c.*, to his use, and at his request. It was also thought to be like the case of a man working upon the house of another, who had knowledge of his proceedings ; in which case, though he could prove no express promise, he would undoubtedly recover for his labor.¹ The case of *Farmington Academy v. Allen* ² differs from the case we have just cited, in the circumstance, that the defendant, who subscribed for the establishment of an academy, was not a trustee. He was, however, an inhabitant of the town, and knew of the erection of the building ; and he, moreover, actually advanced some part of the materials, excusing himself from paying the whole subscription only on the ground of his inability at the time. This was held sufficient to justify the trustees in proceeding to incur expense, on the faith of the defendant's subscription ; and having so done, they have expended money for him, as the court said, on his *implied* request. The defendant was, therefore, held liable to the trustees for the remainder of his subscription, on the ground of money laid out by them for his use. But if the corporation had brought *assumpsit* on an *express promise* for the money subscribed, it could not, in that mode of suing, have been recovered.³

§ 3. It appears by the cases cited in the preceding section, that a corporation cannot sustain an action against an original subscriber, when at the time of the promise, the corporation had

¹ This case is not reported ; we have given it as stated by Parker, C. J., in *Farmington Academy v. Allen*, 14 Mass. R. 175.

² *Ibid.*

³ *Ibid.* and *Phillips' Limerick Academy v. Davis*, 11 Mass. R. 113 ; *Union Turnpike Co. v. Jenkins*, 1 Caines, (N. Y.) R. 381.

not an existence, without showing, at least, some clear indication of concurrence in the party to be affected by it, with the corporate acts and proceedings. It was held to be a general principle, by Sewall, C. J., "that voluntary agreements and promises, however reasonable the expectation from them of gifts or disbursements, even to public uses, when made without consideration, are not to be enforced as contracts ; but when the promise is made in consequence of any thing yielded to the advantage of the promisee, and so where it is a proposal upon a consideration afterwards performed or gained to the promiser, this may import a sufficient consideration."¹ The decision in this case was, that, where persons had subscribed an agreement to pay certain sums respectively for erecting an academy, and the legislature afterwards incorporated certain trustees of such academy, and the act of incorporation provided, that all money subscribed should be received and held by the trustees in trust for the academy, assumption could not be maintained upon the agreement, against a subscriber thereto, for the money by him subscribed. In giving the opinion of the court, it was remarked by the Chief Justice as follows ; " In the case at bar, the defendant actuated by a momentary fervor of public spirit, or anticipating, perhaps, some benefit to himself as well as to his neighborhood, undertakes to contribute a sum of money for the establishment and support of an academy. Others do the like. But the defendant afterwards repents, and will not confirm his stipulated donation. Here is nothing gained to him, or lost to any one else. No consideration proceeds from the public, or from any person who may become constructively entitled to this subscription ; for the grant of the legislature was not made to the defendant, and he has *not been a party to the acceptance of it*. Upon the whole, if he insists upon retracting his subscription, we are of opinion that it is not a contract to be enforced in an action at law." It was suggested in the course of the argument in this case, that some other of the subscriptions which had given birth to the academy were likely to be disputed, in the event of a successful defence by

¹ Phillips' Limerick Academy v. Davis, 11 Mass. R. 117.

the subscriber, in the case we are now considering. The reply of the Chief Justice to this suggestion was, "Suppose the same circumstances throughout proved in those cases, particularly that the subscribers to be charged are not concluded in the corporation, and are not liable by reason of their actual acceptance of the grant from the legislature; they must be considered as having the same power, which has been allowed to this defendant, of retracting their subscriptions."¹

The case of *Union Turnpike Company v. Jenkins*² was an action of assumpsit brought by the president, directors, and the company, against the defendant on two several subscriptions, for certain payments called for, pursuant to the act of incorporation, by the said president and directors. The declaration contained three counts. The first set forth the act of incorporation, the formation of the company pursuant thereto, the subscription of the defendant, the call for certain payments of seven dollars on each share, and his refusal to pay, whereby he became liable. The two remaining counts were on the several subscriptions of the defendant, as on his promissory notes. The principal ground of the motion in arrest of judgment was the alleged want of a consideration to support the promise, without which, it was insisted, the action was not sustainable. No consideration was stated on the record, and no loss or gain to either party; and one of the judges observed, that testing the conduct of the commissioners by the provisions of the act, none was to be found in the contract itself. The act required, that to constitute a stockholder, he should subscribe an engagement in the words following;

¹ It would be improper to omit the remarks, with which Judge Sewall concluded the opinion of the court in this case. "A subscriber's actual acceptance of a legislative grant, as if named or descriptively included in the corporation, he has been concerned in their subsequent proceedings, and had the advantages of a member of the corporation; circumstances of that kind may be considered as entitling the corporation to the benefit of his subscription. To recover upon that title, we would suggest that an action upon an implied promise, as for money received to the use of the corporation, seems to be more suitable than an action upon a special promise, provable by the writing containing the subscription."

² 1 Caines, (N. Y.) R. 361.

“ We, whose names are hereunto subscribed, do for ourselves and our legal representatives promise to pay to the president, directors, and company of the Union Turnpike Road, the sum of twenty-five Dollars, for every share of stock in the said company set opposite to our respective names, *in such manner and proportion, as shall be determined by the said president, directors, and company.*” It also further required, that every subscriber should, at the time of subscribing, pay unto either of the commissioners the sum of ten dollars, for each share so subscribed. It was observed by the court, that the subscription and payment were both essential to the consummation of the contract. The declaration stated the subscription merely, without averring any payment or demand of the ten dollars on each share ; and it was in fact admitted on the argument, that they were neither demanded nor paid. The court were at a loss, under the circumstances, to see any consideration for the promise ; and observed that the legislature appeared to have been apprised of the inconvenience that might arise from this source, and had provided for it, in some measure, by the last clause in the statute, which gave power to the directors, “ to call for, and demand of and from the stockholders respectively, all such sums of money by them subscribed, or to be subscribed, at such times, and in such proportions as they shall see fit, under pain of forfeiture of their shares, and of all previous payments made thereon.” Lewis, C. J., in concluding his opinion in the case, observed ; “ Suppose the speculation had been an advantageous one, and before the first call of the president and directors the stock had risen considerably in value, could not the directors with propriety have refused to consider Mr. Jenkins as a stockholder, on account of his not having made the payment required by the act, on his subscribing ? I think they could. No positive benefit, then, arising from the future emoluments of the company transactions, can be considered as a consideration for the promise ; and if it could, none such is stated on the record. Notwithstanding the motion to amend, it was insisted the suit was maintainable on the second and third counts. I think not. For a promise to pay on a contingency, which may, or may not happen, cannot be declared

on as a note of hand. The instrument must be *payable at all events*.”¹

Where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber, by which he has sustained, or by which he might sustain injury, no action can be maintained against him by the corporation, for the amount of his subscription; but where such subscriber has accepted the charter, and by his own acts put it in operation, he cannot avail himself, as a defence, of the fact, that part of the stock was fictitious.²

Upon one occasion in England, it was holden, that the administrator of a subscriber to a projected canal could not be sued for calls, the party proposing to subscribe having died before the passing of the canal act.³ The action was brought in debt, and it appeared at the trial, that the intended subscriber died as before mentioned, that letters of administration were granted to the defendant and others, and that the defendant paid a certain deposit on the shares to the bankers of the subscribers. But the defendant paid no money subsequently to the passing of the act. The receipt for the deposit was given to the defendant in the name of the party deceased; although wishing himself to be an adventurer in the scheme, he had requested it should be given in his own name. The defendant sold the shares afterwards to a person, who, not liking the speculation, treated the purchase as a nullity, as not having been effected according to the forms prescribed by the act; and the canal company made a call upon the defendant, in his individual capacity, for money upon these shares, treating his sale as void for want of compliance with the above forms. It was insisted, that the defendant was not chargeable, because he was not an original subscriber, nor a person advancing money towards the shares in his own right, his request to have the receipt in his own name not having been complied with; nor had he been personally admitted as a proprietor. A verdict having been found for

¹ See also *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

² *Centre & Kish. Turnpike Co. v. M'Conaby*, 16 S. & Rawle, (Penn.) R. 142.

³ *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. R. 801.

the plaintiffs, it was moved to set it aside, and a nonsuit was subsequently entered, the court being of opinion that the action could not be maintained. The defendant neither filled the character of any subscriber named in the act, nor of any who had subscribed since the act passed. When the receipt in the name of the deceased person was tendered to the defendant, he might have objected, and might have had his money back, but instead of that, he kept the receipt, and thus acquiesced in the share as administrator. Had the company intended to charge him as administrator, the mode of doing so was pointed out by the act, namely, to give the shares to another, in case of the defendant's refusal to pay, or of want of assets; or to declare them forfeited; for the act indemnified exequutors and administrators paying calls upon the shares of deceased persons. Had the undertaking proved profitable, the defendant must have been accountable to the effects of his intestate for the proceeds, and the plaintiffs consequently should have sued him, *if at all*, as administrator.¹

Where a subscriber assigned his stock before the whole of the instalments were paid, it was held, that there was such a privity between the corporation and the assignee, that they might maintain assumpsit against him for the unpaid instalments.²

§ 4. A corporation has no power to assess the shares of a member, unless such power has been conferred by charter, or unless the members have obligated themselves by some act or promise on their part to pay assessments. Chief Justice Parsons, in the case of Andover and Medford Turnpike Corporation v. Gould,³ thought that, although the power to make assessments was not expressly given by the act of incorporation, it would result from a clause in the act which enacted, that the shares of delinquent proprietors might be sold. From such a clause, he said, it might be inferred, that the corporation had a right to agree on an assessment of the shares. But he considered it to be a rule

¹ See also Woolrych on the Law of Waters, &c., 41, 42.

² Bead v. Susquehannah Bridge, &c., 6 Har. & J. (Md.) R. 128.

³ 6 Mass. R. 40.

founded in sound reason, that when a statute gives a *new* power, and at the same time provides the means of executing it, those who claim the power can execute it in no other manner; and therefore, the members of a corporation are not liable to be proceeded against personally in a suit by the company for a legal assessment, unless there has been a *promise* on their part to pay it. If there be no promise to this effect, the only remedy by the corporation is that prescribed by the charter.¹ Where the trustees of a religious corporation in the State of New York, with power to regulate and order the renting of pews therein, assessed the pew of the defendant, and sued him in *personam* to recover the same, the court decided that he was not chargeable, upon an *implied* promise to pay, in consequence of the occupation of the pew, unless there were some special grounds from which to infer a contract and promise to pay.²

§ 5. Unless a party, therefore, clearly engages to pay assessments, he cannot be sued for the amount of them by the company. In one case the evidence offered of the defendant's engagement to pay assessments was in the following words; "We, the subscribers, desirous of having the same (a turnpike) completed as soon as possible, agree to take in said road the number of shares set against our names." This was considered insufficient to maintain assumpsit for an assessment against a delinquent stockholder.³

So, in Massachusetts, in an action by the New Bedford and Bridgewater Turnpike Corporation *v.* John Q. Adams Esq.,⁴ the plaintiffs claimed to recover the amount of certain assessments for the expenses incurred in making the turnpike. The writing, by which it was contended the defendant was liable, was one which

¹ Taunton, &c. Turnpike *v.* Whiting, 10 Mass. R. 327; Franklin Glass Co. *v.* Alexander, 2 New Hamp. R. 380.

² First Presbyterian Congregation *v.* Quackenbush, 10 Johns. (N. Y.) R. 217. The law implies a promise on the part of every individual of a corporation to pay all sums due by their rules or by-laws. 2 S. Carolina Con. R. 215.

³ 6 Mass. R. 40.

⁴ 8 Mass. R. 138.

was subscribed by him and others, and was as follows ; “ We the subscribers, desirous to promote the building of a turnpike and bridges from New Bedford to Weymouth, comprehended in a petition signed by W. Roach, Jr., and others, granted by the honorable legislature in their present session, have divided the expense of building said turnpike and bridges from Thompson’s pond in Middleborough to communicate with the Braintree and Weymouth Turnpike in the town of Weymouth, into five hundred shares, and engage to take the number of shares affixed to our names.” The court considered, that the defendant by signing this agreement simply engaged to become proprietor of a certain number of shares, and that the only remedy, which the corporation had for non-payment of assessments, was to sell the shares.

The case of *Franklin Glass Co. v. White*¹ is a still stronger case against the right of incorporated companies to recover from the stockholders the amount assessed upon their shares, when the act of incorporation authorizes a sale of the shares, in case of a neglect to pay the assessment. In this case, the defendant became owner of one share of the capital stock by purchase. The company, at three several times, made assessments upon the shares, and at each time *the defendant was present* at the meetings, and acted as a stockholder ; had often before *expressed his desire* to have money assessed, to pay the debts of the company ; and he, moreover, afterwards expressed *his satisfaction* with what had been done. It was held notwithstanding, that the sale of the shares, pursuant to the act, was the only remedy of the company. The counsel for the plaintiff contended that there was a distinction between this case and a *turnpike* company ; that the making and maintaining a turnpike road was an affair of public concern and convenience, seldom entered upon or prosecuted for the sake of the profit the undertakers would realize ; and that they could not lawfully effect their object without authority from the legislature ; whereas a company of *manufacturers* could not be presumed to have any object in view, but their private or

¹ 14 Mass. R. 286.

personal gain ; they might carry on their business without legislative interference ; and they asked for an incorporation merely for greater convenience in managing their affairs. The court were not able, however, to perceive a sufficient distinction between the case before them and the cases above mentioned, to justify them in giving a different decision ; as the legislative provisions relative to manufacturing corporations for the sale of the shares of those proprietors, who are delinquent in paying their assessments, were nearly in the same words, as those used in the general act respecting turnpike corporations. In a case where one engaged to take certain shares in a turnpike road, and to pay all assessments thereon, and afterwards the course of the road was altered by law ; it was held, that he was not bound by his engagement to pay the assessments, notwithstanding he had acted in several offices of the corporation, and had, as one of the directors thereof, petitioned the legislature for such alteration.¹

§ 6. We now come to the cases in which it was considered, that the party made himself personally liable by his promise. In the case of *Worcester Turnpike Corporation v. Willard*,² the court decided, that the defendant, having subscribed a contract by which he engaged to take one share, and *to pay all legal assessments*, it was a personal engagement to pay assessments, which gave to the corporation a cumulative remedy against Willard, in addition to the remedy provided by the statute, to enforce the payment of assessments by a sale of shares. On the other hand, in *Essex Turnpike Corporation v. Collins*,³ where the defendant was charged upon a subscription for shares expressed in the same words as that signed by Willard, the decision was in favor of the defendant. But in the latter case, the court were determined, not by the tenor of the promise, but by *the circumstances under which it was made*. The subscription of the

¹ *Middlesex Turnpike Corporation v. Swan*, 10 Mass. R. 384 ; and see *Middlesex Turnp. Corp. v. Locke*, 8 Mass. R. 268 ; *Union Locks and Canals v. Towne*, 1 New Hamp. R. 44.

² 5 Mass. R. 80.

³ 8 Mass. R. 292.

defendant was procured by one F., and it did not appear, that he was authorized by the corporation to act for them, neither did it appear that F. was a member of the corporation, nor that the corporation afterwards assented to what he had done in their behalf. The court, under these circumstances, considered, that the subscription was void for want of consideration. That is to say, if the defendant had brought an action against the corporation for withholding certificates of ownership, there could be no pretence, on the evidence offered, for supporting it ; and if the corporation were not bound, there was no consideration to bind the defendant. The court admitted, that corporations might contract by an agent, but that in the case before them, F. was but a pretended, and not an authorized agent.

In the case of Taunton and South Boston Turn. Company v. Whiting,¹ Judge Sewall said, that he was not disposed to controvert either of the two decisions last above mentioned. The case before him was where one subscribed an engagement to pay on demand to J. G. or order, "*all assessments that may at any time be made by said corporation for the purpose of laying out said road, making and keeping the same in repair, and for damages to individuals for land,*" &c. It was holden agreeably to the case of Worcester Turn. Corporation v. Willard, that the defendant having expressly promised to pay all assessments, he was liable, in an action of assumpsit, brought by the corporation for the assessments. Where one subscribed for certain shares in a turnpike, and promised to pay A. B., agent of the proprietors, all assessments, &c. ; it was held, that though the agent could maintain no action for the unpaid assessments, yet that the promise would support an action by the proprietors in their corporate capacity.²

§ 7. The extent of the liability of a party contracting to pay assessments is, indeed, to be measured by the extent of his express engagement. The engagement may be only to pay assessments upon the shares originally subscribed ; or it may be to pay upon all shares he may, at any period, own. It may be to pay

¹ 10 Mass. R. 327.

² Gilmore v. Pope, 5 Mass. R. 491. Per Parsons, C. J.

all assessments on the shares then owned, so long as the promissor belongs to the corporation ; or it may be to pay upon those shares when he shall have ceased to be a member.¹

In the case of the Franklin Glass Company *v.* Alexander,² in the State of New Hampshire, the original members of the company signed a written agreement to pay all assessments on their shares, which were \$200 each, but it was held that no action would lie on such a promise, if, before the assessments sued for, the member, for a valuable consideration, sold out his shares, though he afterwards bought in the same shares, and after his re-purchase the assessments were made. Mr. Justice Woodbury, who gave the opinion of the court, observed ; “ It is to be remembered that this is a private promise, on which the action is founded, and not a statutory liability, imposed on all the members ; and that when the promise was made, the defendant was an original proprietor, and made the promise concerning shares owned in that capacity. It is to be remembered also, that the person of whom he last purchased was not subject to any such action, and consequently, on general principles, the defendant, his vendee, bought the shares with no other liabilities than what attached to them in the hands of his immediate vendor. There was a period, when the defendant was neither owner of these shares, nor, for aught which appears, a legal member of the corporation. His liability on this contract then ceased, was dissolved ; and if a mere re-purchase of another person’s interest, who was likewise at that time not liable on the contract, will subject the defendant, it must be done by the express letter or spirit of the promise. Without doubt, a promise might be clothed in such broad and explicit language, as to bind the maker of it, in a case like the present. But we apprehend, that an ordinary subscription paper, by the original members, when their shares were worthless, for the mere purpose of raising a capital to commence business, was never designed to subject them to the payment of assessments, made after more than \$200 had been raised

¹ Franklin Glass Co. *v.* Alexander, 2 New Hamp. R. 380 ; Delaware and Schuylkill Canal Navigation *v.* Sansom, 1 Binn. (Penn.) R. 70.

² Ut supra.

on a share ; and though made to purchase stock for labor, yet made after the defendant had ceased to be an original member, and belonged to the corporation only as a subsequent stockholder."

The Chief Justice, in this case, also used the following striking illustration ; " Were the defendant now a member of the corporation, as a guardian in right of a ward, as an executor in right of a testator, or as a trustee to any general uses, it would not be pretended, that, though he represented the same shares which he formerly owned in his own right, his liability to an action for the assessments would revive. No liabilities attach to him which did not belong to those he represents ; and they, being subsequent stockholders, were unaffected by the promise. So in this case, he belongs to the corporation, not as an original member, but as a subsequent stockholder ; and by the re-purchase merely represents his immediate vendor. The promise, therefore, no more binds him on account of this re-purchase, than it bound his vendor ; or than if, after his first sale, he had still continued devoid of any interest whatever in the company."

In the late case of *Salem Mill Dam Corporation v. Ropes*,¹ the promise was to pay all *legal* assessments. In the act for creating the corporation, it was provided, that the capital stock should be divided into 5000 shares, not exceeding \$100 each, and that after 1000 shares should be subscribed for, a meeting of the proprietors might be called, at which any acts might be done, " for the purpose of organizing the corporation, and arranging its affairs. It was held that no legal assessment could be made for the general objects of the act of incorporation, until all the shares should have been subscribed for ; but that an assessment to defray preliminary expenses incurred in obtaining the act of incorporation, and ascertaining the utility of the enterprise, would be valid, and that the subscribers were *personally* liable for *such* assessment, they having, after the passing of the act, signed an agreement to pay all legal assessments which should

¹ 6 Pick. (Mass.) R. 23 ; and see *Central Turnpike Company v. Valentine*, 10 Pick. (Mass.) R. 147.

be made, after the corporation should be organized according to the act.

The case of *Proprietors of Newburyport Bridge v. Story* was determined upon the same principles, though the result was different. In this case the judgment of the court was, that "it not appearing when the sum demanded was assessed, nor that the number of shares prescribed in the act of incorporation had been taken up, nor that there was authority under the act to lay an assessment for any purpose before the subscription should be full, under which circumstances this assessment would be void, the verdict must be set aside and a new trial granted."¹

§ 8. Though, as we have already shown, a person may render himself liable to pay assessments after a transfer, upon the shares he originally had in the stock of a corporation, by a direct promise to that effect; yet a general promise to pay all assessments will not be binding upon him after he has made an assignment of his interest. An action on the case *in tort* was brought by Huddersfield Canal Company for several sums which, it was alleged, the defendant had subscribed towards making and maintaining the Huddersfield canal. By the act of parliament which incorporated the subscribers, the shares were declared to be vested in such subscribers, their executors, and assigns; and the proprietors were enabled to sell their shares, the purchasers being thereafter entitled to have shares in the profits. Power also was given to a committee to make calls for money on the proprietors, and an action of debt, or on the case, was given as a remedy in cases of default. The defendant had been possessed of eight shares, but he sold five of them, and duly transferred his interest therein. The breach stated in the declaration was, that although the defendant had paid his proportion in respect to three shares, (the three which he still held,) he had not paid in respect to the five others which he had also subscribed for. The defendant objected, that he was not liable to further calls after the assignment, and upon a special case, the court were of the same opin-

¹ 6 Pick. (Mass.) R. 45, *note*.

ion, as it was clear, that the legislature meant that the parties should be liable only as long as they continued individually to be members of the company. The act vested the property sold in the assigns of the vendor, and it would be ridiculous to determine, that a person, after he has sold his shares, in respect of possessing which only he became a proprietor, should still continue to be a proprietor. It would be strange to say, that after disposing of the shares, the seller should still continue liable to all the burdens which are thrown on the owners of the property.¹

§ 9. It has appeared already, that though a corporation is authorized by statute, or the charter, to sell the shares of a stockholder for his delinquency in not paying assessments, or to proceed in any manner to enforce payment; yet where a stockholder *has promised* to pay assessments, he is liable to be proceeded against personally, notwithstanding the remedy provided by statute or the charter.²

In an action by a corporation against one of its members to recover certain instalments due upon his stock subscription, the defendant pleaded, that by reason of his default in respect to another instalment, all the stock subscribed by him had been declared forfeited by the company, pursuant to a power contained in their charter, and that the stock forfeited was equal in value to the amount claimed in the suit; the plea in substance was held defective.³ So, as to subscriptions for stock, if a person, who has incurred a liability to be sued upon a subscription, as upon a

¹ *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36, and cited by Mr. Woolrych in his *Treatise on Waters, &c.*, 40. The form of the action being deemed by the court correct, under the act, the *postea* was delivered to the plaintiffs, because interest on a sum, acknowledged to be due by the payment of money into court, had not also been paid.

² See ante, same Chap. § 4, 5, 6.

³ *Herkimer Man. Co. &c. v. Small*, 2 Hill, (N. Y.) R. 127. See also to this point *Hartford &c. Rail Road Co. v. Small*, 12 Conn. R. 499; *Same v. Boorman*, 12 Ib. 530.

promise according to the rules we have laid down,¹ (though a penalty be given by statute for non-payment,) he is still liable in an action of assumpsit. In the case of the Delaware and Schuylkill Navigation *v.* Sansom,² the subscribers to the stock signed an agreement to pay two hundred dollars for each share, as the same should be called for ; and the act of incorporation inflicted a penalty of five per cent per month upon defaulters, and directed that when the penalty should amount to the sums paid in, the share should be forfeited. Inasmuch as there was an express promise, the court held that the company might waive the forfeiture, and proceed personally upon the promise. But as to other shares, which he *did not subscribe for*, but which he held as *transferee*, the court considered that he had given no promise to pay, and that as to *them*, the only remedy was to subject the shares to the payments and forfeiture in the manner provided by the act aforesaid.

A corporation in England brought an action for the amount of calls before the whole capital mentioned in the act had been subscribed. The act provided, that the subscription should be full before any calls were made, and it was objected that the statutory provision had been violated. Of this opinion was the court, and the plaintiffs were nonsuited.³

The question, which the parties had in view in a case in the State of New York, was whether the remedy given to the company by the statute, to exact the penalty of a forfeiture of the shares, and of all previous payments, was not the only remedy ; and the court were very clear, that it was not.⁴

¹ See ante, § 2, 3.

² 1 Binney, (Penn.) R. 70.

³ Norwich and Lowestoft Navigation *v.* Theobald, Moore & Malk. 151.

⁴ Goshen Turn. Co. *v.* Hurtin, 9 Johns. (N. Y.) R. 217. In Kentucky, where a statute gave to a corporation power to sell the shares of a delinquent stockholder, it was held that the remedy was cumulative, and did not impair the common remedy by action ; and although the corporation had attempted unsuccessfully to sell the shares of a member, their remedy by action was held still to remain. Instone *v.* Bridge Co., 2 Bibb, 577 ; Tar River Navigation Company *v.* Neal, 3 Hawks, (N. C.) R. 520.

In the case of *Grays v. Turnpike Company*,¹ in the Court of Appeals of Virginia, the question as to liability to pay assessments depended upon the *sixth* section of the general turnpike law, which enacted, that "if a stockholder shall fail to pay the sum required of him, the president and directors may sell his stock at auction, and retaining the sum due, pay the overplus to the owner. But if the sale shall not produce the sum required to be advanced with the incidental charges, then the president and directors may recover the balance of the stockholder, by motion and ten days' notice." The plaintiffs failing to pay the requisitions, the stock was advertised, but not sold for want of bidders; and the question was, whether they were liable to a recovery by motion for the amount of the requisitions. There were other questions in the case, but this was considered by Judge Carr, who gave the opinion of the court, as the most difficult. He, however, gave the following opinion, in which all the judges concurred. "The power to sell the stock of delinquents was given to the company for their benefit. It was thought, no doubt, that this power would coerce the stockholders to punctuality in paying the calls; and if not, would secure to the company the speedy receipt of the money by sale of the stock. But, in case this sale should not raise the whole sum, a motion is given for the balance. Now ought we to turn this power of sale, given for the safety of the company, to their ruin? If the stock had sold for a single *cent*, there can be no doubt, that this motion would have been sustained for the whole sum required, even for more than is now required; for the sum given would not have paid the costs of sale, and the motion would have been for the sum required, with the addition of such costs. In such case, then, the stockholder would have lost his stock entirely, and been subject, by motion, for the sum demanded; whereas, in the case before us, he is left in possession of his stock, and is only held to pay the sum required, which was certainly the meaning of the law. For, it seems clear, that the intention was to give the motion to supply all deficiencies, which could not be answered by a sale of the stock."

¹ 4 Rand. (Virg.) R. 578.

In the case of the *Commonwealth v. Pennsylvania Benevolent Institution*,¹ it appeared by the return of the *mandamus*, that the articles of incorporation required each member to pay *fifty cents* as a monthly contribution, and should any member neglect to pay his contribution for three months he was to be *expelled*. It was held, that the expulsion of a delinquent member, without notice, and without a vote of the society, was illegal; for he might either have proved that he was not in arrear, or have given such reason for his default, as the society might have deemed sufficient.

In the case *Colby v. Russell*,² in the Supreme Court of Maine, it was held, that where a private statute required the assessors of a corporation to "make perfect lists of assessments *under their hands*, and commit the same to the collector, with a warrant under their hands and seals;" that the signing of the *warrant*, though it were on a leaf of the same book which contained the assessment, was no signing of the *assessment*; and that without a separate signature the assessment was imperfect and invalid.

§ 10. It was established in Massachusetts, in the case of *Gray v. Portland Bank*,³ that if a corporation is created with the privilege of raising a stock not less than one sum, nor exceeding a certain greater sum, and commence business with the smaller capital, and afterwards decide by a vote to augment it to the greater; there is a clear right in the stockholder of the capital first raised to subscribe for and hold the new stock, in proportion to his interest in the old stock; and that if the stockholder should be deprived of this right by his partners, the other stockholders, he may have a special action of *assumpsit* against the corporation for the injury. The measure of damages, it was held, would be the excess of the market value of the stock, above the par

¹ 2 Serg. & Rawle, (Penn.) R. 141.

² 3 Greenl. (Me.) R. 227.

³ 3 Mass. R. 364; and see *S. Sea Co. v. Curson*, 20 Vin. Abr. 5; *Stockdale v. S. Sea Co.*, 2 Atk. 141.

value, at the time of the payment of the last instalment, with interest on such excess ; for if the plaintiff would retain the stock, the then price is what he must pay for an equal amount ; and if he should intend it for sale, that price is what he would obtain for it. Sedgwick, J. was of opinion not only, that the augmentation was intended for the profit of the joint concern ; but he also thought, that admitting it was competent to the stockholders, by the manner in which they prescribed the augmentation of their capital, to prevent him from becoming a subscriber to, and interested in the new stock, yet, that they had not done it ; but, on the contrary, had expressly, by their vote, authorized him to subscribe for the new, in proportion as he was interested in the old stock.¹

¹ Sewall, J., in delivering his opinion, observed as follows. "I shall endeavor to ascertain the nature and extent of the plaintiff's interest and property in the Portland bank, at the time when the vote to increase the capital stock was taken. The limits prescribed by the act of incorporation to the capital stock of this bank were, that it should not be less than \$100,000, nor more than \$300,000. The right to create and employ this stock for the purposes of a bank was vested in the persons named in the act, and in their associates, successors, and assigns. Their interest in the \$100,000 first paid in, and upon which the corporation commenced business, is not questioned. The doubt, which has been raised, respects only the power of increasing this stock. This the stockholders, in their vote of January 4, 1802, assumed to be a property not subscribed for, and therefore, one would suppose, not belonging to them ; yet they act upon it as subject to their disposal ; and determine that some may be admitted to subscribe, while others are to be excluded ; and, in a word, that it was new stock, and not an addition of the bank already commenced ; and yet it seems to have been understood, that the new stockholders would become interested in the original bank-house purchased from the first subscription, and benefited by all the other expenses of the institution, as far as it had proceeded. And thus they undertook to decide that these advantages, procured at the expense of A. were at the disposal of B., or might be taken by him, at his will and pleasure, and sold for his benefit, at the market advance on bank stock. The statement of these inconsistencies discovers, I apprehend, very clearly, the mistake, in this particular, of the stockholders, who were assembled at that meeting.

"Viewing a corporation of this kind as a co-partnership, a power of increasing their stock, reserved in their original agreement, is a beneficial

But if in such case, a stockholder of the stock first raised, after having done every thing incumbent on him to entitle him to become a proprietor of the new stock, be prevented from subscribing by the other stockholders, he cannot be considered as a

interest vested in each partner, to which no stranger can be made a party, but by the consent of each subsisting partner; and it is a power which the subsisting partners must exercise proportionably, and according to their interest in the original stock.

"Or considering an incorporation for a bank, as I think it may be more correctly stated, to be a trust created with certain limitations and authorities, in which the corporation is the trustee for the management of the property, and each stockholder a *cestui que trust* according to his interest and shares, then a limitation of the capital to be employed in the trust, that it shall not be less than one sum, and not exceeding a certain greater sum, is not a power granted to the trustee, to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit in any other proportions than those determined by their subsisting shares. It is clear that a power of that kind might be given, but not by the limitation supposed, which plainly relates to one and the same stock. Whether the least, or the greatest, or any intermediate sum be employed in it, the trust is the same, and for the use and benefit of the same persons. A share in the stock or trust, when only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestui que trusts* agree, upon employing a greater sum, within the limits provided, in the purposes of the trust.

"This view of the subject avoids the objection relied on for the defendants, resting on the circumstance, that the shares of this bank are, by the act of incorporation, to be numbered in sums of one hundred dollars each; from which it seems to have been understood that the increase of stock, being to be made by additional shares, required a new subscription. But the legislature could not intend, in providing this mode of enumeration, to change entirely the nature of the trust established by the incorporation; and to establish the security of the members first engaging in it, in the beneficial interest and property they might acquire in the institution.

"Another objection has been stated in the argument for the defendants, which requires some consideration. It is, that the act of incorporation provides no means of enforcing payment from the stockholders, whenever an increase of stock should be agreed on.

"The act provides that the stockholders shall, at their first meeting, determine the amount of payments to be made on each share, and the time when each payment shall be made. And in a previous clause they have

proprietor of the new stock, and entitled to his proportion of the dividends upon it; but a stranger, who should be admitted in his stead, would acquire a vested interest in the stock, which could not be defeated; for the registry of ownership, kept by the officers of the bank, is to them the only evidence of it; and to the individual stockholder his evidence is his certificate.¹

Every proprietor of the old stock may relinquish his right to become interested in the new; or his right may be forfeited by

authority to ordain, establish, and put in execution by-laws, ordinances, and regulations for the government of the corporation, the prudent management of their affairs, &c. If the power of increasing their stock continued after the dissolution of their first meeting, the power necessarily carried with it the authority of the stockholders to appoint the payments on each share, and to enforce them by their by-laws. A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement among the stockholders to enlarge their shares, in amount or in number, to the extent required to effect that increase. The shares first paid in became the first instalment of the increased capital; and the subsequent payments might be reasonably enforced, by providing for a forfeiture of delinquent shares, to be sold and accounted for to the stockholder; the proceeds to be carried to his account, deducting the instalments, or additional payments required. This course has been, I have some reason to believe, adopted by other similar institutions for a like purpose.

"I do not mean to say, however, that a subscription, submitted to the consideration of every stockholder, without any exception, or any attempt at exclusion, might not be equally just, and under some circumstances as expedient as a by-law to forfeit delinquent shares. The operation of such a subscription, if it made any difference, would be a relinquishment of shares by the proprietor; but in that case the shares relinquished ought to accrue to the benefit of the institution. If from the progress of the institution, and the expenses incurred in it, any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belonged to the whole; and was not to be disposed of, at the will of a majority of the stockholders, to the partial benefit of some, exclusive of others.

"The contrary course, taken in this instance, was, in my opinion, an unjust transfer of shares, belonging to the plaintiff, to another; or, at least, a refusal to transfer them to the right owner."

¹ Per Sedgwick, J., in *Gray v. Portland Bank*, 3 Mass. R. 385, 388; and see *Titcomb v. Union Marine Fire Ins. Co.*, 8 Mass. R. 326

- not being claimed ; and in either case, strangers or other stockholders may be admitted in his stead. And, we may add, that though an original stockholder is entitled to a new stock, yet he is not compelled to take it.¹

¹ Gray v. Portland Bank, sup.

CHAPTER XVI.

OF THE TRANSFER OF STOCK IN MONEYED, OR JOINT STOCK
INCORPORATED COMPANIES.

§ 1. SHARES in incorporated joint stock companies are not, strictly speaking, *chattels*; and it has been considered, that they bear a greater resemblance to *choses in action*; or, in other words, they are merely evidence of property.¹ They are, it has been said, mere demands of the dividends as they become due, and differ from movable property which is capable of possession and manual apprehension.² But where *certificates* of shares are given to a purchaser, the case is more analogous to the sale of chattels, and the transfer may be considered complete.³ It might indeed well be supposed, that the delivery of the certificates of the shares would amount to a *symbolical* delivery of the shares themselves; and would have the same operation as the delivery of the

¹ Chattels personal are things movable, such as animals, household goods, money, jewels, corn, garments, and every thing else that can properly be set in motion, and transferred from place to place. Long on Sales, 2; 2 Black. Comm. 386, 387. Chattels were rarely an object of notice prior to the reign of Henry VI.; and were in a state of insignificance by the common law until the revival of trade and manufactures. 2 Kent, Comm. 277. Personal rights not reduced into possession, but recoverable by suit at law, are *choses in action*, as money due on bond, note, or other contract; damages due for a breach of covenant, for the detention of chattels, or for wrongs. "By far the greatest part of the questions," says Kent, "arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of *personal rights in action*." 2 Kent, Comm. 285.

² Wildman v. Wildman, 9 Ves. R. 177; Kirby v. Potter, 4 Ibid. 751. And the circumstance that government is the debtor makes no difference. Ibid.

³ Per Parker, C. J., in Howe v. Starkweather, 17 Mass. R. 243; and see also Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) R. 96; and see U. States v. Vaughn, &c., 3 Binney, (Penn.) R. 394.

documentary proofs of title to a ship at sea, which, being as complete a delivery as the subject-matter admits of, will convey the property in the ship. It is a general rule, that there may be a symbolical delivery, when the thing does not admit of an actual delivery. Thus, a bill of sale of timber of great bulk, has been held to be a delivery sufficient to make the possession follow the right.¹ A delivery of an indorsed dock warrant, with a certificate from the seller to the buyer, is, in England, considered to transfer goods lodged with the West India Dock Company.² And it will always be found, that a transfer of shares in the stock of an incorporated company can be made by *writing*.³ In a late case in England the court held, that the law *required* such a mode of transfer; and that the assent of the owner to part with his stock could only be given by that mode.⁴ It is at all events clear, that this species of property may be transferred from seller to buyer by a written instrument of conveyance.

The rule, that shares may be conveyed by writing, applies as well to a limited interest, as to a complete and full property therein. It has been expressly held, that a life interest in the stock of an incorporated company, is in the nature of an annuity, which is always transferable. In this case, a guardian sold the shares of his ward, which had been given by will to the latter *during life*. The court said that the ward's interest was by law transferable, and might be taken for the ward's debts, (under the statute making shares subject to attachment,) provided the ward were of capacity to be liable by attachment.⁵ A person to whom shares have been *bona fide* transferred will hold them, though no certificate has been given him. In a case in Massachusetts, the objection was made, that the plaintiff had no certificate of his ownership, though he had an instrument of transfer. The court

¹ *Manton v. Moore*, 7 T. R. 67.

² See First Am. Ed. of Starkie on Evidence, vol. 3, p. 1643.

³ *Davis v. Bank of England*, Peterdoff's Abr. 410, and 2 Bing. 393.

⁴ *Ibid.*

⁵ *Ellis v. The Proprietors of Essex Merrimack Bridge*, 2 Pick. (Mass.) R. 243.

said ; " We think that cannot prejudice his claim, as it is not in his power to obtain one without the consent of the corporation."¹

In another case in the same State, it was strongly insisted that the defendant could not be a member of the Chester Glass Company without a certificate of his share ; it being provided by the act respecting manufacturing corporations, that the stock shall be divided into shares, and that certificates shall issue to the stockholders ; and the court said, " It is not essential to the existence of the corporation that certificates should have issued. The corporation might be compelled, if there were a court of chancery, to give certificates ; but still for want of them the stockholders would not lose their rights."²

§. 2. A provision is frequently introduced into acts and charters of incorporation prescribing the manner and form in which the stockholder shall transfer his shares. The shares, held by the owners of the immense capital composing the Bank of England, are declared by the charter to be of the nature of personal estate ; and the contract of transfer is required to be registered in the books of the bank within seven days, and on which the stock shall be transferred within fourteen days. The profits are divided half yearly, and the dividends payable at the bank.

The fund of the Bank of Scotland is declared assignable, the transfers being entered in a book subscribed by the assignor and assignee ; it is also disposable by will entered in the book of transfer, without any confirmation.³ A provision may be introduced empowering the company to regulate transfers by a by-law. But any by-law, it should be observed, requiring any extraordinary formality or imposing an impediment in the transfer of shares, unless the power to make it has been expressly given by charter, would be void. Thus it was held, that a by-law which limits the transfer of stock in an insurance company to be made at the office

¹ Ibid.

² *Chester Glass Company v. Dewey*, 16 Mass. R. 94.

³ 1 Bell, Comm. 66.

personally or by attorney, and *with the assent of the president*, would be in restraint of trade, and contrary to the general law which permits the right to personal property to be transferred in various other ways.¹ And under a general authority given by charter, that the company shall have power to make by-laws, "touching the transfer of the shares," the company cannot impose any unreasonable restraint, as for instance requiring the president to authenticate, and the clerk to attest the certificates. The purchaser, or other person entitled in such a case, has only to make his right known to the corporation, that it may be entered upon their books. This is all that can be required.²

§ 3. A person receiving a transfer of shares from a stockholder indebted to the company is entitled to the shares, even without paying the debt due from the assignor. In the case of *Bates v. New York Insurance Company*, the company had refused to transfer, unless the assignee would pay the debts due from the assignor, and the assignee, who paid under those circumstances, was permitted to recover back the the money, on the ground, that the corporation had no right to require such a payment. A different rule, however, was adopted with regard to the dividends which were due, when the corporation had notice of the assignment. The money, then being in the hands of the company, was considered as appropriated towards a debt which was then actually due. But the company were held obliged to make the transfer on the day when the last instalment was made, and the assignee was to have dividends thereafter to be made.³

¹ *Sargent v. Franklin Insurance Company*, 8 Pick. (Mass.) R. 90.

² *Ibid.* *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. R. 476; 2 Kyd, 122. By the operation of law one partner may make a legal demand and have his transfer entered for his co-partner. *Lamb v. Durant*, 12 Mass. R. 57, and *Sargent, &c. supra*; *Gilbert v. Iron Man. Co.*, 11 Wend. (N. Y.) R. 627; *Kortright v. Buffalo Com. Bank*, 20 Wend. (N. Y.) R. 91.

³ *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; and see *Marine Bank v. Bydys*, 5 Har. & J. (Md.) R. 489.

That an incorporated company has no *implied* lien on the shares of the stock, as security for debts due from any of the stockholders, has also been held in Massachusetts, in the case of *Sargent et al. v. Franklin Insurance Company*.¹ This was assumpsit to recover damages of the defendants for refusing to transfer to the plaintiffs (copartners) on the books of the company, and deliver to them a certificate of twenty-five shares of the capital stock of the company, standing in the names of Adams & Amory, and alleged to have been assigned by them to the plaintiffs. Adams & Amory had held a certificate of the shares, dated February 10, 1824, and made an instrument of assignment of the same to the plaintiffs, dated May 24, 1826. On the next day, May 25th, before 12 o'clock and during business hours, Brooks, one of the plaintiffs, called at the office of the company, and, the president of the company being absent, exhibited to the secretary the instrument of assignment with the power of attorney from the assignors to the assignees, empowering them to make a transfer of the shares on the company's books, and demanded certificates to be issued in the names of the assignees, offering, at the same time, to surrender the certificates of Adams & Amory. The secretary read the assignment and power, but declined doing any thing in the matter, saying it was the president's business. On the same day, May 25th, at 12 o'clock, the defendants caused the same shares to be attached, at their own suit against Adams & Amory. On the 9th of June and the 19th of October following, the defendants caused the same shares to be attached a second and a third time, in other suits commenced by them against Adams & Amory on two other demands, which had respectively become due at those times. Judgment was recovered in all these suits, and executions issued, on which all the shares were successively sold, and the proceeds paid over to the company, in satisfaction of the demands against Adams & Amory. The by-laws of the company made it the duty of the president "to attend at the

¹ 8 Pick. (Mass.) R. 90.

company's office, during the hours of business," to discharge the various duties of his office. Certificates of stock were required, by the by-laws, to be *authenticated* by the president, and it was made one of the duties of the secretary, "to attest all certificates and transfers of stock." The certificates bore upon the face of them, that they were "transferable only at the office of said company, by [the holders] or their attorney." The plaintiffs, in their first count, demanded damages on account of the shares not having been transferred to them on the books of the company, according to the assignment; and in the second count, they claimed the dividends that had accrued upon the shares. It was agreed that the plaintiffs should be nonsuited, or the defendants defaulted, according to the opinion of the court. The court held, that the company had no lien upon the shares, as security for their demands, against the assignors; that they were bound to enter on their books a transfer of the shares in pursuance of the assignment of the same; that they were liable in damages to the assignees of the shares for not so doing; and that the amount of the damages was the value of the shares at the time of refusal, with interest from that time.¹

¹ It was contended for the defendant, on the authority of *Gray v. Portland Bank*, 3 Mass. R. 364, that the value of the shares, at the time of the demand and refusal to transfer them, should be the measure of damages. It was contended for the plaintiffs, that, as the defendants had taken the shares for which the plaintiffs had paid, they should be held to pay as much, at the least, as they would be liable to pay for not transferring the stock which had been loaned, or stock which had been paid for in advance, according to the rule adopted in New York, and stated in *Clark v. Pinney*, 7 Cowen, (N. Y.) R. 681, and the cases there cited. But Putnam, J., who gave the opinion, observed; "Speaking for myself only, I should have been inclined to adopt that rule, which would have charged the defendants with any advance upon the value between the time of the demand and the trial. But all my brethren prefer the other rule, and on the ground, that the defendant should not be held to pay more for this property than for goods which they had wrongfully converted to their own use. We decided in *Kennedy v. Whitewell*, 4 Pick. (Mass.) R. 466, that in *trover* for goods, the rule of damages in this commonwealth is the value at the time of the conversion, notwithstanding the goods had been sold at an advanced price before the trial. And it is to

§ 4. But the rule that an assignor of stock can convey a title, without paying what he owes the company, of course would not hold, if by the charter of the company it is provided, as is often done, that all debts due the company from a stockholder must be satisfied before any transfer shall be made. And this lien is not divested, by the circumstance, that the company has taken any other security. Thus, in the case of the *Union Bank of Georgetown v. Laird*,¹ which was an appeal in a bill of equity to the Supreme Court of the United States, James Smith, on the 19th of March, 1811, drew a bill at sixty days' sight, on James Patton, in favor of Andrew Smith, for 1800 dollars. This bill was accepted by Patton, and was discounted in the Union Bank of Georgetown, at the instance of Andrew Smith, and when it became due, another bill of the same tenor was drawn and accepted by Patton, and discounted for the purpose of paying the preceding acceptance. This last acceptance became due on the 14th and 17th of July, and was protested for non-payment; and at the time that it became due, Patton held 50 shares of stock in the Union Bank, which the bank considered liable to the payment of this acceptance, under their act of incorporation. At this time, also, James Patton had another debt pending in the bank. Being one of the original subscribers to the bank, for the above mentioned 50 shares of stock, he borrowed of the bank, in January, 1811, the sum of 1500 dollars, and to enable him to obtain the loan, procured Marsteller and Young, and the defendant, Laird, to become his indorsers. This loan was renewed from time to time, and was continued, without any default of payment, until about the 29th of July, 1811. On the 26th of March, 1811, Patton obtained from the officers of the bank a certificate of his 50 shares of stock, and on that day delivered it to the defendant, Laird, to secure him, as it was alleged, against his indorsement for Patton.

be observed, that the certainty and uniformity of a rule may be of more public utility, than one which is fluctuating."

¹ 2 Wheat. R. 390.

On the 10th of July, 1811, Patton executed a power of attorney, authorizing the defendant, Laird, to make a transfer of his stock ; and on the 22d of August, 1811, he executed a deed of assignment to the defendant, Laird, of his stock ; but as this assignment was not made upon the books of the bank, it was not considered a valid assignment, according to the rules of the bank. Laird, considering himself entitled to the benefit of these shares, under the circumstances, applied to the bank to transfer upon their books the shares for his own benefit. But the bank, upon the ground that the acceptance, which Patton had failed to pay, operated as a lien upon those shares, refused to suffer the transfer to be made until that debt was paid. Laird, some time after this refusal, to wit, on the 22d of February, 1812, paid the 1500 dollars, for which he was indorser for Patton, reserving, nevertheless, his equitable claim upon the stock, and then instituted this suit in chancery, against the Union Bank, to compel them to suffer the transfer to be made on their books for his benefit, and to account with him for the intermediate profits. He charged in his bill, that when Patton obtained the certificate of his shares of stock, it was with a view of pledging those shares with him for his indemnification, and that the officers of the bank had a knowledge of this fact. He also alleged, that the power of attorney was granted with the same view. The directors of the bank filed their answer to this bill, and denied any knowledge of the object for which the certificate of shares was obtained ; and alleged, that they knew nothing of any claim of Laird upon those shares, until after the protest of Patton's acceptance. The court below made a decree in favor of Laird, that the bank should suffer him to transfer the shares for his own benefit, and have an account for the intermediate profits.

Mr. Justice STORY in delivering the opinion of the court, said ; " The principal question is, whether, under the circumstances of this case, Laird, the original plaintiff, has a right to a transfer from the bank of the fifty shares of its capital stock, standing in the name of Patton, without paying the acceptance of Patton ; or, in other words, whether Laird has a priority of lien upon these

shares. By the 11th section of the act of incorporation, (act of 18th February, 1811, ch. 86,) it is enacted, 'That the shares of the capital stock, at any time owned by any individual stockholder, shall be transferable only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf, by the president and directors ; but all debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder, requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary.' The certificate, issued to Patton for the 50 shares held by him, (which is in the usual form,) declares the shares to be 'transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate.' No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank ; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. The president and directors of the bank expressly deny that they have waived, or ever intended to waive, the right of the bank to the lien, for debts due to the bank, by the form of the certificate, and that they ever directed any transfer to be made to Patton which should stipulate to that effect. Under such circumstances, it must be held, that the shares are responsible for the debts due to the bank.

"The next inquiry is, whether the bank has done any thing to deprive itself of the lien upon the shares for the acceptance of Patton, since the same became due, and to let in the equitable title of the plaintiff. The acceptance is not yet paid ; and nothing has been done by the bank affecting its rights, unless the subsequent taking of security for the acceptance from Smith can be construed so to do. Certainly the bank had a right to require additional security from the indorser of the acceptance ; and it cannot be perceived upon what principles this can be construed an extinguishment of its lien upon the shares of the acceptor. A creditor may lawfully take and hold several securities for the same debt from his joint debtors ; and he cannot be compellable

to yield up either until his debt is paid. And in this case, there is no want of equity in holding the shares of Patton, who is the immediate debtor to the bank, liable in the first instance, rather than resorting to the security of an indorser, who is only liable upon the default of the acceptor.

“ The decree of the circuit court must, therefore, be reversed, and the bill be dismissed.”

So in the case of the Huntingdon Bank, in Pennsylvania ; that bank, it appeared, was subject to the provision, that its stock “ shall be assignable and transferable on the books of the company only, in the presence of the President or Cashier, and in such manner as the by-laws shall ordain ; *but no Stockholder, indebted to the institution, shall be authorized to make a transfer, or receive a dividend, till such debt shall have been discharged*, or security to the satisfaction of the directors given for the same.” A stockholder, who was indebted to the bank on a note discounted, and also for an instalment due for the capital stock, gave a power of attorney to receive the dividends in his own name, and, at the same time, another power of attorney, to transfer his stock to the plaintiffs, who placed in the hands of an attorney a sum of money to pay the instalment ; and the attorney, after depositing the money to his own credit, drew a check in favor of the stockholder, and the money was applied to the payment of the instalment, no notice having been given to the bank of the power to transfer the stock until some months afterwards. The court held the plaintiff was not entitled, either to a transfer of the stock, or to a return of the money which had been applied to the payment of the instalment.¹

§ 5. Under the above recited clause of the Pennsylvania act regulating banks, a question arose as to what was meant by the word “ *indebted* ; ” and whether a stockholder, who had given a

¹ Rogers &c. v. Huntingdon Bank, 2 Serg. & Rawle, (Penn.) R. 77 ; and see also Sewall v. Lancaster Bank, 17 Serg. & Rawle. (Penn.) R. 285.

note to the bank, had a right to transfer *before it became due*. No one, we think, can doubt the propriety of the exposition given by Tilghman, C. J. to the the expression just mentioned, who held that a note, given by a stockholder to the bank, was a debt due from him to the bank, before as well as after it became due, according to the meaning of the act. He observed, "No doubt, this restraint on the transfer of the stock was intended for the benefit of the bank. But of what benefit would it be, if the stockholder had the unrestrained right of transfer, at any time before his note fell due? The time of making this loan is that at which the directors must look out for security. If the stock was pledged by law, they might be easy as to other security. But if, trusting to this pledge, they discounted a stockholder's note, who had the right to withdraw his stock at pleasure, then the security in fact amounted to nothing. To be sure, if it were clearly ascertained, that by '*indebted*' the law meant nothing but a debt *actually due*, the bank directors would have no right to complain; because they would know that the stock was no security."¹

§ 6. A transfer of stock will be valid, however, as between the *vendor* and *vendee*, though the act of incorporation provide, that no such transfer shall be valid or effectual till registered in a book kept for the purpose, and the debts due from the vendor to the company be first paid.² Thus in the case of the Bank of Utica *v.* Smalley,³ it was contended that C. was an incompetent witness for the bank, because he was a stockholder. Accordingly, C. immediately transferred his stock, and was then permitted to testify. The transfer, it was contended, was not valid, because it was not registered in a book kept by the company for that purpose; the sixth section of the act of incorporation pro-

¹ Grant *v.* Mechanics Bank of Philadelphia, 15 Serg. & Rawle, (Penn.) R. 140.

² Grant *v.* Franklin Ins. Co. 8 Pick. (Mass.) R. 90.

³ Bank of Utica *v.* Smalley, 2 Cowen, (N. Y.) R. 770.

viding "that no transfer of stock should be effectual until it is so registered, and all debts due from the stockholder are paid." The court held, that this provision was intended *exclusively* for the benefit of the bank, Mr. J. Sutherland observing; "The legislature intended, by this section, to afford to the bank the means of ascertaining with certainty who they were bound to consider and treat as stockholders. But if A., being a stockholder in the bank, and also indebted to the bank, transfer his stock to B., all his interest passes. It is a valid transfer as between A. and B., but B. takes it subject to the claims of the bank against A. The registry can be made as well by B. as A." Stock of the old bank of the United States, which had been transferred by the owners in London, with a delivery to the purchaser of the certificate, accompanied with a power of attorney to transfer it on the books, in conformity to the act of incorporation and by-laws under it, was held to be vested in the vendee, before the transfer was entered upon the books.¹

So, where it is provided that no transfer of any share in the capital stock shall be valid, until *the whole be paid in*, if a stockholder assigns his interest before that time, it is conveyed to the assignee. Thus, in Massachusetts, in the *Marblehead Social Insurance Company*, the action was assumpsit for money had and received; second count, for also D. B. and W. S. were indebted to B. R., and to recover his demand, &c., he caused to be attached 150 shares of the capital stock subscribed by them in the said company, and sold to satisfy his execution, and, thereupon, the plaintiff purchased them, and notice thereof being given to defendants, they became obliged to admit him, &c. The statute incorporating the company provided, that no transfer of any share in it should be valid, until *the whole capital stock should be paid in*. D. B., for himself and partner, previously to the attachment, and before *all the stock was paid in*, transferred the 150 shares to J. S., who was their creditor, in satisfaction of his demand. It was held, that they transferred to him the equitable

¹ U. States v. Vaughn, &c., 3 Binney, (Penn.) R. 394.

interest, so far as to justify the corporation in issuing the certificate of shares to him, and to consider him the true owner when all the stock was paid in. The court went on the ground, that the intent of the legislature, in the prohibition, was only to prevent speculations in the scrip, &c., and *not intended to prevent a debtor's bona fide transfer to his creditor.*¹

The Supreme Court of Connecticut have, however, considered that where it is required, that a sale of shares shall be registered, the registry operates, not merely to perfect a conveyance previously begun, or to give notice of a conveyance previously perfected, but is of itself *the originating act in the change of title.* Thus, the shares of the *Marlborough Manufacturing Company* were made by the charter of the company transferable only on their books in such form as the directors should prescribe. A by-law was duly established, which required, "that all transfers of stock should be made by assignment on the treasurer's book, either in person, or by authorized attorney, on surrender of the certificate granted for the stock, and a new certificate being granted by the treasurer." No assignment was made on the book; no certificates of ownership were surrendered, or new ones received; and nothing was done, but the giving of the credit of the amount of the share, on the treasurer's book to the successive holders. The court was of opinion, that the stock had not been legally transferred. "Though the form of the assignment is not pointed out," said C. J. Swift, "yet the by-law, on its fair construction, requires, that there must be a *written assignment on the treasurer's book, subscribed by the assignor, or his authorized attorney, to constitute a transfer of the stock.*"²

And a sale on pledge of stock, accompanied by a letter of attorney to make the transfer, where the regulation is that no transfer shall be valid until received for record, is of no avail, in Connecticut, to convey a title, until the transfer is received for record.

¹ *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. R. 476; 1 Dane's Abr. 466.

² *Marlborough Man. Co. v. Smith*, 2 Conn. R. 579; and see the *Newton and Bridgeport Turn. Co.* 3 Conn. R. 544.

For in all transfers subject to such regulation, the change of title takes place when the instrument of transfer is received for record by the clerk ; and the transfer bears date from that time. Therefore, where A., the holder of certain shares of stock in such company, agreed with B. to transfer them to him, as security for acceptances and advancements made by B. for A. ; and for that purpose A., on the 20th of October, at 9 o'clock, A. M., executed and delivered to B. a letter of attorney to the clerk of the company, authorizing him to transfer such shares to B., which was sent by mail to the clerk, and was received by him, on the 8th of November following, in pursuance of which he made a regular transfer of the shares to B. on the books of the company ; C., a creditor of A., attached the same shares, on the 20th of October, at 10 o'clock, A. M. in a suit against A., in which he recovered judgment, more than two years afterwards, and had his execution levied on the shares, which were sold, and C. became the purchaser ; it was held, that C. obtained thereby a legal title, and B. had no title, to the shares. Dagget J., who gave the opinion, said, that the case must be governed by the decision in the case of the Marlborough Manufacturing Company, and the Newton and Bridgeport Turnpike Company ;¹ and that, in the last of those cases, the judgment proceeded upon the precise point raised in the case before him.²

But in Connecticut a written assignment of stock, made *in pais*, according to the prescribed form, and seasonably registered on the books of the company, *is a transfer on the books of the company*, within the meaning of the charter requiring it.

Thus, in *Northup v. Curtis and others*,³ the sole question was, whether when stock in a turnpike had been attached, the stock had not been previously and in a legal manner transferred to one

¹ *Supra*.

² *Oxford Turn. Co. v. Bunnell*, 6 Conn. R. 552. In the case of the Newton and Bridgeport Turn. Co. it was held, that the registry operates, not merely to perfect a conveyance previously begun, or to give notice of a conveyance previously perfected, but is of itself *the originating act in the change of title*. 3 Conn. R. 544.

³ *Northup v. Curtis, &c.* 5 Conn. R. 246.

H. The act incorporating the company provided, that the shares of the stock should be transferable only on the books of the company, in such manner as the company should by their by-laws direct ; and a by-law of the company provided, that the board of directors should prescribe the form of transfer to be registered by the clerk, on the books of the company, and that no transfer should be valid, unless so made and registered. In 1803, before any transfer of the shares, the directors prescribed the following form of transfer. " I, B. D. of N., in the county of F., do, by these presents assign, make over, and transfer to G. H. of W., full original shares in the capital stock of the *Bridgeport and Newton Turnpike Company*, with all the privileges, and subject to all the burthens thereunto appertaining, value received of him, the said G. H. Witness my hand," &c. In 1814, B. Hine held two shares of the stock for which he was an original subscriber, and was the assignee of one hundred and sixty and a half shares, under bills of sale from sundry persons, made *in pais*, in the form prescribed by the by-law, and afterwards registered on the books of the company. The plaintiff claimed, that on the 27th of December, 1814, Hine, in payment of debts due from him to them respectively, assigned to E. Graves and J. Graves sixty-two and an half shares, and to the plaintiff one hundred shares, by bill of sale, in the form prescribed by the by-law ; and that afterwards, viz. on the 29th of December, 1814, such assignments were registered at full length, on the books of the company, by the clerk. The plaintiff had since acquired the title of E. and J. Graves. The defendants claimed, and introduced evidence to prove, that after the bills of sale had been executed by Hine, they were delivered by him to one Masters, to be carried to be registered ; and that Masters then had in his hands five writs of attachment against Hine ; and it was agreed by Hine, that these writs would be carried with the bills of sale to the clerk's office, and should be served first on Hine's stock, and that the bills of sale should then be delivered to the clerk to be registered ; and that accordingly, the writs were served, and the bills of sale delivered, in that order. The defendants

also claimed, that S. Noble attached the stock of Hine, on the same day, before the bills of sale were received for record ; and that after the service of the other attachments, and after the receipt of the bills of sale by the clerk, but before they were recorded at length, viz. at 2 o'clock in the morning of the 28th of December, J. Nichols attached the same stock ; and that all these attachments were regularly with the judgments recovered, and executions issued thereon levied on the stock in question, the whole of which was sold according to law. And the defendants offered in evidence such attachments, judgments, and executions, and sales thereon, to show, that the plaintiff had no title to any part of the stock. The plaintiff admitted, that the two shares, for which Hine was an original subscriber, might legally be taken by attachment and execution ; but objected to the evidence offered by the defendants for the purpose of disproving the plaintiff's title to any of the other shares claimed by him, on the ground, that Hine had no title at law to them. The defendants insisted, that the transfers to Hine, having been made and registered on the books of the company, in pursuance of the by-law, and in the form prescribed by the directors, were made on the books of the company pursuant to the charter ; so that Hine thereby had a legal title to all the shares ; and that, as all the attachments were made before the transfers from Hine to E. and J. Graves, and to the plaintiff, were recorded at full length on the books of the company, they had priority thereto, and took all the shares, so that the plaintiff acquired no title whatsoever, in law or equity, to any part of the stock in question. The court were of this opinion, and admitted the evidence offered by the defendants, and thereupon decreed, that the plaintiff should take nothing by his bill ; and upon a motion for a new trial it was held by all the judges, that it could not be granted.¹

§ 7. A guardian of a person *non-compos* has a right to sell any

¹ And see further on this subject Post, Ch. X. § 5, parts 5 and 6.

of the personal estate of his ward, and though he may improperly make a sale, a *bona fide* purchaser would have a good title.¹ *The Proprietors of Essex Merrimack Bridge* gave N. B. a certificate, that she was a proprietor *during life*, pursuant to the will of her father, of a certain number of shares ; and she being *non-compos*, her guardian made a deed of the whole property in the shares, in which the certificate was recited to the plaintiff, a *bona fide* purchaser. The deed was left with the clerk of the corporation to be recorded, but no new certificate was issued to the plaintiff. It was held, that all N. B.'s interest passed by the deed, and that the plaintiff might maintain an action for money had and received against the corporation to recover the dividends. A question was made, whether the instrument of conveyance given by the guardian was legally sufficient to pass the property ; and it was contended, that as the guardian attempted to sell the whole property in the shares, nothing passed by the deed. But the court held, that the plaintiff being a *bona fide* purchaser, the deed conveyed all that the guardian had a right to sell, by the operation of the common principle in relation to deeds and grants.² By the statute of Massachusetts of 1817, a guardian is now prohibited to sell his ward's stock in a corporation without license from the judge of probate.³

§ 8. It is an incumbent duty on the part of a bank, or other joint stock corporation, not to permit a transfer of stock until they are satisfied of a party's authority to transfer. If stock be transferred under a *forged* power of attorney, the real proprietor is entitled to have it replaced by the company, and also the dividends due thereon. This point was determined, in a case in which the Bank of England was defendant, and one which was twice

¹ *Davis v. The Proprietors of Essex Merrimack Bridge*, 2 Pick. (Mass.) R. 243.

² *Davis v. The Proprietors of Essex Merrimack Bridge*, 2 Pick. (Mass.) R. 243.

³ *Ibid.*

argued.¹ It was an action on the case ; and it appeared, that the plaintiff in the month of May, 1819, had standing in his own name on the books of the bank, £10,000 3 per cent. consolidated bank annuities, £178 10 per annum long annuities, and £800 navy 5 per cent annuities. In October, 1819, by virtue of certain instruments purporting to be powers of attorney executed by the plaintiff to the Messrs. Drummonds, they sold out two several sums of £5000 of the 3 per cent consolidated bank annuities, and afterwards £75 bank long annuities, part of the said stock then standing in the name of the plaintiff. The signatures to these powers of attorney proved to be forgeries ; and the question the court were called upon to decide was, whether the stocks which stood in the plaintiff's name on the books of the bank had been transferred out of that name. Their opinion was, that the plaintiff's property in the funds had not been transferred ; that he was still the legal holder of those funds, and entitled to the dividends payable on account of them. They considered it clear, that a transfer in writing not made by the party transferring, or some agent, duly authorized, could have no effect ; and they thought, that the rule, that a forged indorsement on a bill of exchange conveys no interest in such bill, was applicable to the question before them. They laid down the broad principle, that transferable shares of the stock of any company could not be divested out of the proprietor by *any* act of the company, without the authority of the stockholder ; and maintained that the Bank of England had no more authority to affect the interest of any stockholder, than the most insignificant chartered company had to dispose of the shares of the members of such a company.

In the opinion given by the court in the above case, the court observed ; “ We are not called on to decide, whether those, who purchase the stocks transferred to them under the forged powers, might require the bank to confirm that purchase to them, and

¹ *Davis v. Bank of England*, 2 Bing. 393 ; and also fully reported in 3 Petersdorf's Abr. 410.

to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent, as far as we can, the alarm which one argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons from whom you bought were not legally possessed of the stocks they sold to you, the answer would be, that the bank, in the books which the law requires them to keep, and for the keeping of which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property; and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers, to all the various persons through whom such stock had passed. Indeed, from the manner in which the stock passes from man to man, from the union of stock bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as we can that of an estate. We cannot look further, nor is it the practice ever to attempt to look further, than the bank books for the title of the persons who propose to transfer to the persons therein named." The court having decided, that the stocks remained the property of the plaintiff, he of course was also entitled to the dividends; and therefore the whole consequences of the forgery would fall upon the bank.¹

¹ Bridgeman in his *Chancery Digest*, says; "Where stock was transferred under a forged power, the transfer is void and the right owner shall not be hurt; but the dividends received under the false power, together with the

In the case last cited, it appears that the plaintiff knew of the forgeries, and concealed them, though they did not come to his knowledge until several months *after they were committed*. And when he was informed by the person who committed them, (his brother,) that he had done so, he did not communicate such information either to the bank or to any magistrate, until after the brother had escaped from the prison in which he was confined, and was probably out of the kingdom. This conduct of the plaintiff the court thought, under circumstances, might amount to a misdemeanor; and they said, that in this case the plaintiff could only receive such dividends as he had required the bank to pay him, and which they, having been so required, had refused to pay, and that the dividends demanded were those which became due on the long annuities on the 5th April, 1820, and those on the consols which became due in the month of July in the same year. These dividends, it was contended, the plaintiff was barred from receiving, because the bank (the plaintiff not having given information of the forgeries) might have paid them to other persons. The opinion of the court was as follows; "We agree with the counsel for the bank, that if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries, as he ought to have done, on the 25th March, 1820,) they could have refused to pay, then he cannot recover such dividends in this action. We say, in the language of Lord Mansfield, in *Bird v. Randall*, that whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only; but we say, that it does not appear in this case that any thing was given in evidence by the defendants that did in equity and conscience bar the plaintiff. It is not enough for the defendants to say, that they might have paid these dividends to other persons. To

stock, shall be taken from the assignees, and restored to the right owner;" and the case of *Hildyard v. South Sea Co.* (2 P. Wms. 76) is cited. But this decision, *Bridgeman adds*, does not appear to have been followed; for *Ashby v. Blackwell* (Amb. 503) is *contra*.

defend the action, on the principle laid down by Lord Mansfield, they must prove, that they have paid them to persons to whom they could have refused to pay them, had they been informed of the forgeries. But no evidence of any such payment appears in this case. It has been insisted at the bar, that upon principles of public policy, we ought not to permit the plaintiff to prevail in his action. Public policy is a doctrine on which judges should proceed with caution, otherwise the rights of the subjects of this country would depend on their discretion. There are many things which most of us think against good policy for which actions are brought, for instance, wagers. We ought not to trust ourselves with so dangerous a power, as that of acting judicially on disputable policy.

“ Can we say, that indisputable policy requires, that a man should lose his all for a misprision of felony ? Policy prevents the assertion of a civil right, in cases of this nature where actions are brought for doing something directly injurious to the public, or declared to be so by positive law.

“ Thus, if the law has forbidden the doing of an act, it has recognised the impolicy of doing it, or if it has commanded an act to be done, it has recognised the impolicy of not doing it ; and the courts would not allow an action to be maintained for doing the act prohibited, or abstaining from doing the act commanded. Therefore, if the plaintiff's action had been founded on the concealment of the forgeries, it could not have been supported. But the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff, due on stocks belonging to him. The misprision of felony, of which he has been guilty, forms no part of this case. If misprision of felony is to be opposed to the action, it must be on the ground, that the plaintiff, having had a good cause of action on account of the bank's refusing to do their public duty by paying his dividends, has forfeited his right to maintain such action by being guilty of misprision of felony. We know nothing of forfeitures on notions of public policy ; for forfeitures we must have positive law. Misprision of felony is but a misdemeanor, and punished not by any forfeiture, but by fine and imprisonment, at the discretion of the court before which

the offender is convicted. The defendants cannot have attempted to apply to this case the rule, that civil actions are merged in a felony. If the plaintiff was seeking to recover what had been obtained by means of these forgeries, either from the forger or any person who had received the property from him, the defendants might protect themselves under this rule.

“ But it has never been held, that the owner cannot, before prosecution of the felon, proceed for redress against the persons through whose negligence the thief committed the felony. If goods are stolen from a carrier or innkeeper, the owner may bring his action against them without instituting any prosecution against the felon. The bank stands in the situation of the carrier or innkeeper. It has never been decided, that a concealment of felony from the carrier or innkeeper, by the owner of the goods, was an answer to such an action. Concealment can be no answer, except the jury were to infer from it, that the owner was privy to the robbery, or the defendant could show, that such concealment had prevented him from recovering the goods. This case was put to us in argument ; A., knowing that B. has forged A's. name to a draft on his banker, sees B. come out of the banker's shop with the money obtained by the forgery, and neither arrests B., or gives any information to the banker. Could A. recover this money again from the banker ? A jury in such a case must find that A. was privy to the forgery at the time it was committed, and they would, I think, infer, that A. assented to it, and such finding would prevent his recovering in an action against the banker. But in the present case, the jury have expressly negatived all knowledge by the plaintiff, until three months after the forgeries. They have also negatived assent, saying, they have no instance of assent, except the concealment of what came to the defendant's knowledge in three months after the forgeries, from which they have not inferred assent, nor can we.”¹

¹ The judgment in this case was reversed in the Court K. B. (5 Barn. & C. 185) and although the reversal took place on the ground of a defect in the pleadings, the guarded manner which was used in delivering the judgment, so as to avoid giving any sanction to the decision in the Common

There is a case in the old reports of Barnardiston, where a man of the name of Edward Harrison got the South Sea stock, belonging to another Edward Harrison, put to his account in the books of the company, and then transferred this stock to his broker to sell, and which stock the broker sold. A bill in chancery was filed by the executors of Edward Harrison, the owner of the stock, against the executors of Edward Harrison, who so fraudulently procured it to be put in his name ; and the Chancellor said, that the plaintiff should have a quantity of stock equal to that transferred bought for him, or else have a satisfaction for the stock equal to what it was worth at the time it was sold out. And his lordship added, there is another more difficult question, and that is, how far the company may be liable to make satisfaction, in case there are not sufficient assets left by the Harrison who improperly possessed himself of this stock. In this case, it was assumed,¹ that the stock had passed out of the name of the owner by this transfer under a fraudulent assumption of his name, although he never assented to such transfer ; but whether it had so passed or not, was not considered. But it has been thought, that this case was not correctly reported by Barnardiston.* The same case is to be found in 2 Atkyns, in the name of Harrison v. Harrison. It appears by the latter report, that the stock was transferred by a trustee, and if so, the question, whether a transfer unauthorized by the stockholder would alter the property in the stock, could not have arisen, the trustee having a legal authority to transfer, though he might be guilty of a breach of trust by exercising that authority.

§ 10. There is no question, that movable and tangible personal property, such as corn, jewels, garments, household goods, &c. (if not expressly exempted by statute) may be seized and

Pleas, gives reason to suspect, says a late English writer, that the latter is not to be considered as an unimpeachable authority. Woolrych on Com. & Mer. 262.

¹ Such was the construction of the court in *Davis v. The Bank of England*, *supra*.

² *Ibid*.

sold upon execution, by the sheriff.¹ But the question, whether money, bank bills, and stock in incorporated companies may at common law be thus seized and sold, has been considerably discussed.

Lord Mansfield said, that there were some old cases in which it had been held, that the sheriff could not take money in execution, even though found in the defendant's *scrutoire*; and that a quaint reason was given for it, viz. that money *could not be sold*.² But it is evident, that he did not think this a sound reason, and the result of the motion in that case would seem pretty strongly to sanction the right of the officer to take money upon an execution. This has, however, been otherwise ruled in the King's Bench, in later cases, and carried so far, that the court would not allow the sheriff to apply surplus money raised on a sale of property under an execution, to the satisfaction of another execution in his hands, against the same defendant, although no other property was to be found.³ In the case, however, of *King v. Webber*,⁴ it was ruled, that a sheriff *might* take ready money by a *levari facias*; and in this respect, there was no difference between a *levari facias* and a *feri facias*; and in *Dalton's Sheriff*,⁵ it is laid down expressly, that money may be taken by virtue of a *feri facias*. The Supreme Court of the United States, upon a careful examination of the authorities, have adopted the same doctrine; and they say, that they could perceive no reason why an execution should not be levied on money; that the one given in the books, that money could not be sold, was not a good one; that the reason of a sale is, that money only will satisfy an execution, and if any thing else be taken it must be turned into money; but that this could be no good reason for refusing to take the very article, to produce which is the sole object of the execution.⁶

¹ *Handy v. Dobbin*, 12 Johns. (N. Y.) R. 220; *Holmes v. Nuncaster*, *ibid.* 395; *Bogart v. Perry*, in error, 17 Johns. (N. Y.) R. 351.

² *Armistead v. Philpot*, Doug. R. 231.

³ *Fieldhouse v. Croft*, 4 East, 510; *Knight v. Criddle*, 9 East, 43.

⁴ 2 Shower, 166.

⁵ *Dalton's Sheriff*, 145.

⁶ *Turner v. Fendall*, 1 Cranch R. 117. But the court considered in this

The Supreme Court of New York have also expressly decided, that *money* or *bank bills* may be taken in execution ; and have fully concurred in the doctrine advanced in the case last cited.¹ In another case, the court said, that on looking again at the cases they could find nothing to induce them to doubt the soundness of the above decision.²

When personal chattels are attached, another creditor, who would make a second attachment, must do it by the same officer who made the first ; because he has possession of the chattels, and the creditor therefore knows to whom to deliver his writ.³ But where property is of so *intangible* a nature, as *shares* in the *stock of a corporation*, there can be no change of possession. And as it is uncertain whether they are under attachment or not, the sale of them upon execution is not justifiable at common law.⁴ Thus, in an action brought against a sheriff in the State of New York, it appeared that the sheriff had sold among other property one share in the Bank of Columbia, and three shares in the Hudson Library ; Kent, C. J., said, “ The bank and library shares were levied on by mistake, for these were mere *choses in action*, and

case, that the creditor had not such a legal property in the specific pieces of money levied for him and *in the hands of the sheriff*, as to authorize that officer to take those pieces on execution, as the goods and chattels of such creditor. The money, they held, became liable to such execution, the instant it was paid into the hands of the creditor ; and it then became the duty of the sheriff to seize it. C. J. Marshall observed ; “ It appears unreasonable that the law should direct a payment under such circumstances. If the money shall be seized the instant of its being received by the creditor, then it seems a vain and useless ceremony which might well be dispensed with.”

¹ *Handy v. Dobbin*, 12 Johns. (N. Y.) R. 220 ; see also *Williams v. Rodgers*, 5 Johns. (N. Y.) R. 167.

² *Holmes v. Nuncaster*, 12 Johns. (N. Y.) R. 395 ; *Orr v. M'Bride*, 2 N. Carolina Law Expository, 257 ; *Spencer v. Blaisdell*, 4 N. Hamp. R. 198.

³ *Denny v. Hamilton*, 16 Mass. R. 402. Personal property is bound by the execution from the time it is delivered into the hands of the sheriff. *Cresson v. Stout*, 17 Johns. (N. Y.) R. 116 ; *Newell v. Sibley*, 1 Southard, (N. J.) R. 381.

⁴ *Howe v. Starkweather*, 17 Mass. R. 240 ; *Denny v. Hamilton*, 16 Mass. R. 402 ; *Wildman v. Wildman*, 9 Ves. 97.

not the subject of a levy and sale by a *fiery facias* any more than bonds and notes."¹

But though a sale made by the sheriff, like the one in the above case, be irregular and unjustifiable, yet, if certificates of the shares are given to the purchaser, the case is more analogous to the sale of common chattels. And, according to the construction of the Supreme Court of Massachusetts, the delivery of the certificate would be like the delivery of the chattel, and the transfer may be considered complete.²

In Connecticut, it seems that shares in a *turnpike* company form an exception to the rule, that shares in the stock of corporations are not liable to a levy and sale by the sheriff; and this decision would equally apply to a *canal* company, it being founded upon the supposition, that the company had an incorporeal right or easement in the land upon which the road is constructed.³ But in Massachusetts, in the case of *Howe v. Starkweather*,⁴ Parker, C. J., who gave the opinion of the court, expressly says; "Shares in a *turnpike*, or *other* incorporated company, are not chattels. They have more resemblance to choses in action, being merely evidence of property; the sale of them upon execution not being justifiable at common law."

It has been held in Pennsylvania, that a turnpike road cannot be levied on by an execution issued upon a judgment obtained even against *the company*. The plaintiff in error in this case, having obtained judgment against the president, managers, and company of the New Alexandria and Pittsburg turnpike road, is-

¹ *Denton v. Livingston*, 9 Johns. (N. Y.) R. 96; and see Com. Dig. *Tit. Execution*, c. 4. In Louisiana, the creditors of a stockholder cannot sell his share in the property of a corporation. *Williamson v. Smoot*, 7 Martin, (La.) R. 31.

² *Howe v. Starkweather*, 17 Mass. R. 240. But even in that case, unless by the return of the officer, it appears that the requisition of the statute respecting the levy upon, and sale of, shares of debtors in incorporated companies, has been complied with, the corporation may not be justified in giving certificates to the purchaser. *Ibid*.

³ *Swift's Digest*, and 2 Conn. R. 567.

⁴ *Howe v. Starkweather*, 17 Mass. R. 243.

sued a *feri facias*, and levied on "all the right, title, interest, and claim of the defendants, of, in, and to ten miles of the said road," &c. ; and the question was, whether property of this kind was subject to a levy by virtue of a *feri facias*.¹ Tilghman, C. J., in delivering the opinion observed ; " It has been decided, that every kind of interest in land, legal or equitable, is subject to an execution in this State. But it does not appear, that the turnpike company had any estate of any kind, in the land over which this road runs. They were incorporated by the legislature for the special purpose, in which the public were much interested. They were permitted to enter on the land, and make a road, under certain regulations, and when the road was finished and approved by the Governor, to take certain tolls. But there is nothing in the incorporating act, which authorizes the company to transfer their right to other persons ; and such transfer would certainly be inconsistent with the whole design and object of the law. It was presumed, that the right would remain in this corporation, and the act contains a complete system, providing redress in cases of delinquency, and calculated to protect the public from the consequences of such delinquency. The inconvenience would be excessive, if the right of the company could be cut up into an indefinite number of small parts, and vested in individuals. The defendants had no tangible interest,—nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent, or profit, of any kind, issuing out of land,—nothing but a right to receive toll, for horses, carriages, &c., passing over the land, which would be more or less, according to the number of passengers, and that would much depend on the condition in which the road should be kept. Every kind of right, or license granted by the act of assembly, was confined to the company. They alone were confided in. They alone were looked to for a faithful performance of the important duties incumbent on them. But it may be said to be extremely hard, that a corporation should be permitted to contract debts,

¹ *Ammant v. President, &c. of New Alexandria and Pittsburg Turnpike Road*, 13 S. & Rawle, (Penn.) R. 210.

and possess the means of paying them, and yet their creditors should have no power of coercion. And certainly such a state of things is both hard and unjust. But it does not follow that the proper remedy is by execution. Experience is every day pointing out defects in our law, which can be remedied only by the legislative power. And the defect which now appears is well worthy of, and will, no doubt, receive the attention of our legislature. It may probably be thought advisable to provide some mode of sequestration, by which the profits, arising from roads, may be secured to the creditors of the respective companies. But in providing this remedy, the public interest will not be neglected. Care will be taken, that so much of the tolls, as is necessary, shall in the first place be applied to the repair of the road, and only the *nett profits* subject to the payment of debts. A court of chancery would do something of this kind, but our courts possess no such power. All that we can do is to levy on the property, and either sell it, or deliver it to the creditor, in case the rents and profits will pay the debt in seven years. But this kind of proceeding is altogether unsuitable, in a case like the present, and therefore, I am of opinion that the Court of Common Pleas was right in quashing the proceedings. If a turnpike company has a right to land, or other property, not on the road, there is no reason why it should not be subject to an execution. But, in the present instance, the levy, though made in part, on a lot of land contiguous to the road, had so blended the different subjects, that it was difficult to separate them, and therefore the court was justified in quashing the whole proceedings. I am of opinion, that the judgment should be affirmed."

It being clear that shares in incorporated companies are not at *common law* liable to execution, they have been expressly made so in Massachusetts, and in some other States, by *statute*. The statute in these cases generally directs the mode of attachment by mesne process, the course to be pursued when they are attached, and when they are sold on execution. But under such provisions, where the charter, or a general act of the legislature, requires that no stockholder, who is indebted to a bank, shall make a transfer of his stock, until his debt is discharged, the judgment creditor

cannot levy. Or, perhaps it might be more proper to say, that if the judgment creditor does levy, the lien of the bank will be preserved; and this lien will extend to notes *drawn* before and *falling due* after the levy. So much respect is in fact paid to this lien given by statute, that a bank is not bound to appropriate part of the debtor's shares to pay their demands, and transfer the balance to the judgment creditor, even though the stock is sufficient to pay it and leave a balance.¹ In the case just referred to it was observed by the court; "It is long settled and not disputed, that a lien is a good bar to an action of trover; the bank had a lien and were justified in refusing to permit a transfer of the stock until the lien was discharged." Where an act of incorporation prescribes the particular manner in which the shares of members in the stock are to be attached, and sold on execution; such provision supersedes the general provision of a statute on the same subject.²

By the act of 1796, establishing the Third Massachusetts Turnpike Corporation, it was provided, that the shares therein "may be attached, and may be sold on execution in the same manner as is or may by law be provided for the sale of personal property by execution;" *a copy of the execution and of the officer's return being left with the clerk of the corporation within ten days after the sale.* It was afterwards decided, that the general act of 1804, directing the mode of attaching and selling by execution shares of debtors in incorporated companies, repealed the provision for the same objects contained in the act of incorporation.³

¹ Sewall v. Lancaster Bank, 17 S. & Rawle, (Penn.) R. 385. It had been before settled in Pennsylvania, that the word "indebted" extended to notes given to the bank which had not fallen due. Rogers v. Huntingdon Bank, 2 S. & Rawle, (Penn.) R. 77; Grant v. Mechanics Bank, 15 Ib. 140.

² Titcomb v. Un. Marine and Fire Ins. Co., 8 Mass. R. 326.

³ Howe v. Starkweather, 17 Mass. R. 240. The same general act respecting the sale, &c. of shares in corporations provides also for the sale, &c. of an equity of redemption. And it has been held, that an officer, who had sold an equity of redemption on execution, was bound to pay over the surplus money arising from the sale, to another officer having an execution against the same debtor. Denny v. Hamilton, 16 Mass. R. 402.

There is great difficulty, it is said, in getting a transfer made to a creditor of a stockholder, at the Bank of England; for by law such transfer must be entered and the entry signed by the person making the transfer, or his authorized attorney. And in the act providing, that the court of chancery or exchequer may order a transfer by the secretary of the bank, there are only three cases mentioned, absence of trustee, bankruptcy, and lunacy.

It may gratify the curiosity of some of our readers to know the provisions and practice in relation to the seizure and sale of shares upon execution in the great national bank of Scotland.

It is declared in the charter of the Bank of Scotland, that the shares may be transmitted by *adjudication*, or other legal conveyance, in favor of one person alienably, who, in like manner, shall succeed to be a partner in his predecessor's place; so that the aforesaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence in any sort, to the diminishing or disturbing of the stock of the said company and good order thereof." It is also provided, that on bankruptcy or forfeiture, the governor and directors may order the bankrupt, or forfeited person's share, to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands.¹ Doubts having been entertained respecting the proper diligence for attaching the stock, the bank took this course to try it; Fairholme, on his bankruptcy, owed £3000 to the Royal Bank; and they adjudged his bank stock, with a view to sell it for the payment of his debt. But it was questioned whether this was a title so secure, that purchasers would think it eligible. The bank, therefore, called on the cautioner for Fairholme to pay up the debt; and he suspended, insisting upon the benefit of the stock. The bank stated, that they could make no transfer, but, 1. On a conveyance from the proprietor; or 2. In favor of an executor of production of his confirmed testament; and that no instance of a transfer on adjudication had occurred. The court held the adjudication to be a good title, on which the bank

¹ 1 Bell, Comm. 66.

could transfer. The judgment, therefore, ordered the cautioner to pay, upon the bank conveying to him the bank shares which belonged to Fairholme, with such diligence as they have used for effecting the same, with warrantice from fact and deed ; and found, that, in consequence thereof, the bank was bound to receive the purchaser or his assignee, in Fairholme's place, with regard to the said shares, in the same manner as they are in use to do in other sales or transactions of their stock.¹

The Royal Bank of Scotland was by a charter of erection, in pursuance of 5 Geo. 1. c. 20, established ; the stock was declared movable and descendible to executors, but at the same time, not liable to arrestment or attachment. And by a by-law no proprietor can transfer but in the presence of a court of Directors, who may stop the transfer till he find surety for what he owes the bank. The creditors of a stockholder of this bank may, by personal diligence, force a sale ; even should the words of the charter, passed in fulfilment of the statute, prevent direct attachment.²

§ 11. A stockholder may transfer his interest in the stock by a conveyance, which is even absolute *in form*, and still be a member afterwards.³ Thus, where A. surrendered his certificate of stock to the bank, and at the same time, left with the cashier an agreement, in which, after reciting that he had transferred the shares as collateral security for the payment of a certain note to the bank, he covenants, that if the note shall not be duly paid, the bank may sell the shares and apply the proceeds to the payment of the note, and hold the surplus to his use ; he paid interest from time to time upon the note after it had fallen due, and continued to receive the dividends upon the shares. Held, that he was still a member of the corporation ; Parker, C. J., who gave the opinion saying ; “ we do not consider that his transfer of his

¹ 14 Feb. 1770, Bank of Scotland *contra* Fairholme, Hamilt. 46 ; cited in Bell. Comm. 66, in notes.

² Ibid.

³ See ante, p. 70, 71.

shares to the bank, though absolute in form, divests his right and interest in the shares.”¹

In a case, where A. being indebted to a bank for a loan of \$7,900, and being the owner of 380 shares of stock in that bank, empowered the president to transfer the 380 shares to himself in trust for the bank, to secure the payment of the debt and interest thereon; the bank afterwards called on each stockholder to pay an instalment of \$5 on each share, which A. failed to do; afterwards the president retransferred the stock, and A. paid the bank the \$7,900 with interest; between the time for paying the instalment of \$5 and the re-transfer, the bank declared two dividends, to recover which A. brought assumpsit; it was held, that A.’s neglect to pay the instalment forfeited his claim to the two dividends, and that the action could not be maintained.²

§ 12. A doubt has been entertained, whether a contract for the transfer of stock is within the 17th section of the English statute of frauds.³ In an action for shares in the stock of the Governor and Company of the copper mines in England, the Judges of the common pleas, and afterwards all the Judges of England, were equally divided on the question, whether this was a contract coming within the statute of frauds.⁴ In a subsequent case the plaintiff had agreed with one Green, who was the defendant’s broker, for £5000 South Sea stock, at £187 per cent., to be delivered about ten days after; and at the day appointed, the plaintiff attended at the transfer office all day with his money, but the defendant never came, and stock having in the mean time considerably risen, the defendant refused to transfer. Thereupon, the plaintiff filed a bill in chancery for a specific performance, and the defendant pleaded the statute of frauds. When the case came on before the Chancellor, he seemed to be of

¹ Merchants Bank v. Cook, 4 Pick. (Mass.) R. 405.

² Marine Bank of Baltimore v. Biays, 4 Har. & J. (Md.) R. 338, Johnson J. dissenting.

³ 29 Car. ii. c. 3, § 4.

⁴ Pickering v. Appleby, 2 P. Wms. 308, cited in Long on Sales, 56.

opinion that the plea was good, and said, that it had been held so in many cases. The defendant, however, having barely pleaded the statute, without adding that there was no memorandum of the agreement, the plea was held bad on that account.¹ In a subsequent case in chancery, where a bill was filed for a specific performance of an agreement for the transfer of some York-Building's stock, it became unnecessary ultimately to decide the question, whether the contract was within the statute of frauds, as the case was decided on the ground of the defendant's plea being badly pleaded.²

§ 13. An interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption ; it is therefore a mere right, and the circumstance, that government is the debtor, makes no difference. It is a mere demand of the dividends as they become due, having no resemblance to a chattel movable, or coined money, capable of possession and manual apprehension, and cannot, therefore, be taken in execution.³ An extraordinary division of a sum of money by the Bank of England, among the proprietors of the stock, beyond the usual dividends, is considered as capital, and therefore, not the absolute property of the tenant for life. Lord Eldon, in this case followed, but disapproved the former decisions, holding the circumstances, that the division was in money, not stock, and that it was to be presumed to be profit, arising in the time of the tenant for life, too slight to form a distinction. It was true, he said, that the bank had it in their power to give the *bonus* to the tenant for life, or not.⁴

In a case where A. was bound to transfer £300 East India stock before the 30th of September, though the stock had risen considerably ; yet the transfer was decreed in specie, as also an account of the past dividends.⁵ In a later case, Lord Eldon

¹ *Mussell v. Cooke*, Prec. in Chan. 533 ; also cited as above.

² *Colt v. Netterville*, 2 P. Wms. 304 ; see also Sel. Cas. in Chan. 41, and *Starkie on Ev.* (Am. Ed.) Vol. 2, p. 608.

³ *Kirby v. Potter*, 4 Ves. 751 ; *Wildman v. Wildman*, 9 Ves. 177.

⁴ *Paris v. Paris*, 10 Ves. 185, and see *Clayton v. Gresham*, 10 Ves. 288.

⁵ *Gardner v. Puller*, 2 Vern. 394.

said, the broad principle of the court was, that no attention whatever is paid to the rise or fall of the stock ; and upon that ground, it is considered equal, whether the appropriation is on one day or another ; the party takes the rise or fall as it happens.¹

Where a transfer of stock was made by way of loan upon bond, with condition to replace the stock in six months, with interest in the mean time at 5 per cent ; and the stock not being replaced and being depreciated, it was held that the obligee was entitled to the value of the stock at the time of the transfer, with interest at 5 per cent to the time of the report, credit being given for some payments on account of the principal. In an action recently after an agreement to transfer stock, the rise, if any, would be given by a jury in damages.² If a trustee sells stock, the *cestui que trust* has an option, either to have the stock or the produce of it with interest.³

The English Court of Chancery will not order a reference to inquire, whether it would be for the benefit of *infants*, that money in executor's hands should be laid out in mortgage. It adopts as a general rule, that the investment in the 3 per cent consols is most beneficial to the suitors, and never varies from this rule without special circumstances.⁴

A bill will not lie for a specific performance of an agreement to transfer stock, unless where the thing contracted for may be particularly commodious to the party.⁵ In *Nuttbrown v. Thornton*,⁶ the council cited *Errington v. Aynesly*,⁷ to show that there was no instance of a decree for the specific delivery of chattels, where a compensation may be made in damages. It was stated, in 1804, by Lord Eldon, that it was now perfectly settled, that the court of chancery would not enforce the specific performance

¹ Per Lord Eldon, *Ex parte Pye*, 18 Ves. 155; and see *Morris v. Preston*, 7. Ves. 551.

² *Forest v. Elwes*, 4 Ves. 492, 497.

³ *Ibid.*

⁴ *Norbury v. Norbury*, 4 Madd. 191.

⁵ *Cud v. Rutter*, 1 P. Wms. 570.

⁶ 10 Ves. 159.

⁷ 2 Bro. C. C. 341.

of a contract for a transfer of stock ; but, he continued, "in a book I have of Mr. Brown's, I see Lord Hardwicke did that."¹

Where a demurrer to a bill was filed by the Bank of England, for an injunction against an action by an executor for a transfer of stock, it was allowed ; because considering the stock as specifically bequeathed to trustees in France upon special trusts, if the executor, from the nature of the bequest, cannot maintain the action, an injunction is unnecessary ; and if he can upon his title to the stock, there is no equity.²

Where there was a bill for an account of the produce of £20,000, *mortgaged* by plaintiff to defendant, and to be paid the balance, deducting principle and interest due ; an account was directed, of all moneys received on sale of the pledged stock, though the day of redemption was past ; it not appearing that the defendant had sufficient stock to answer the plaintiff ; and after principal and interest satisfied, the residue to be paid, and the stock not sold to be transferred to the plaintiff.³ It is not necessary to foreclose on a forfeited mortgage of Exchequer annuities, but the mortgagee may sell them on change at the market price.⁴

¹ Nuttbrown v. Thornton, 10 Ves. 159.

² Bank of England v. Lunn, 15 Ves. 509.

³ Harrison v. Hart, Com. R. 393.

⁴ Held by the Lords, *Contra*, the opinion of Lord Harcourt, in Tooker v. Wilson, 1 Bro. P. C. 494 ; Lockwood v. Ewer, 2. Atk. 303, S. P. held as to India stock.

CHAPTER XVII.

OF THE PERSONAL LIABILITY OF THE MEMBERS OF A PRIVATE CORPORATION FOR THE DEBTS OF THE COMPANY.

§ 1. WE have before mentioned, as one of the properties peculiar to a private aggregate corporation, the irresponsibility of the members who compose it for the company debts.¹ No rule of law, we believe, is better settled, than that, in general, the individual members of a private corporate body are not liable for the debts, either in their persons or in their property, beyond the amount of property which they have in the stock.²

It was holden in a case in Massachusetts, that if an execution issue against an aggregate corporation, by the name of the "Pres-

¹ Ante, p. 25, 26, 31, 32.

² Where the Treasurer of a Corporation gave his promissory note in that capacity, for the proper debt of the corporation, it was holden, that he was not personally liable. *Man v. Chandler*, 9 Mass. R. 335. This case is clearly distinguishable from *Tippets v. Walker*, (4 Mass. R. 595,) in which the contract was under the seals of the defendants, and they produced no authority to bind the corporation. It was held in Maine, that the property of an incorporated banking company only could be seized for the debts of the company, and not that of the members. *Adams v. Wiscasset Bank*, 1 Greenl. (Me.) R. 361. In a case in Massachusetts, where the sessions had received and recorded the verdict of a jury, ascertaining the damages sustained by the owner of land over which a turnpike road passed, and ordered, in default of payment of damages by the corporation, that a warrant of distress be levied on the personal property of the proprietors; the court, upon *certiorari*, quashed the order as to the issuing of the warrant of distress. *Commonwealth v. Blue Hill Turnpike Corporation*, 5 Mass. R. 420. In *Myers v. Irwin* (2 Serg. & Rawle, (Penn.) R. 371,) Tilghman, C. J. says; "The personal responsibility of the stockholders is inconsistent with the nature of a body corporate." And see *Merchants Bank v. Cook*, 4 Pick. (Mass.) R. 414; *Brewer v. Gloucester*, 14 Mass. R. 216; *Marcy v. Clark*, 17 Mass. R. 333; *Andrews v. Callender*, 13 Pick. (Mass.) R. 484; *Atwater v. Woodbridge*, 6 Conn. R. 223.

ident, Directors, and Company ;" with directions to the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution. Parsons, C. J. observed ; " In this case, notwithstanding the precept, yet in fact the corporation, against which the execution issued, having no bodies liable to arrest, the officer could arrest none in obedience to his writ. It appears that he understood the name of the corporation expressed by the words, the *president, directors, and company*, as descriptive of natural persons, whose bodies he ought to arrest ; which appears to be a pardonable mistake to which he was led by the improper manner, in which the execution was issued."¹

The members of a private corporation are also exempted in their persons and estates from the liability of an action at law, instituted by a company creditor, even if a portion of the company property has been assigned to them, in exclusion of the creditor ; that is, if there be no *fraud* in the transaction.

In the case of *Vose v. Grant*,² it appeared that the stockholders of the Hallowell and Augusta Bank, after the expiration of their charter, made dividends of their capital stock among themselves, so that there were not corporate funds left sufficient to redeem their outstanding bills. It was admitted that the stockholders, in making those dividends, had been guilty of no fraud, for at the time they were made, the debts due to the bank, with twenty-five per cent. of the capital stock undivided, would be sufficient to pay all the debts due from the bank. But it happened that the president and one of the directors, both apparently in good circumstances and in good credit, and largely indebted to the bank when the dividends were voted, afterwards failed. The plaintiff was a holder of the bills of the bank, and brought an action on the case for the neglect, carelessness, and default of the defend-

¹ *Nichols v. Thomas*, 4 Mass. R. 232. The Chief Justice in this case observed, that if an execution should illegally issue against the body of an executor or administrator on a judgment against the estate of the deceased, the officer might be justified in arresting the body, as he did not mistake his precept which issued from a court having jurisdiction.

² 15 Mass. R. 505.

ant, who was a stockholder, in order to recover the amount. The opinion of the Court, which had been prepared with great deliberation by Judge Jackson, was ; first, if any right of action accrued, it was to those who held the bills at the time of the misconduct complained of ; and that such a right could not be assigned to the plaintiff. That alone, it was considered, would have been decisive of the action ; but as the general question presented in the case was a very important one, it was deemed proper to investigate and decide it. In investigating the question, his Honor alluded to the fact, that there was no evidence of fraudulent or dishonest intentions on the part of the defendant and the other stockholders ; and said, if the present action could be maintained, as for a tort, several consequences would follow which, all would admit, were highly unreasonable and unjust.

His Honor then proceeded to state what the consequences would be ; “ In the first place, any of the stockholders might be sued alone ; because in an action founded on tort, it is not necessary to join all the wrongdoers ; and the defendant cannot, in such a case, plead the omission of the others in abatement. Secondly, the individual who was sued would be liable to the whole extent of the injury complained of, without regard to the amount which he had received on the division of the stock. If a man has done me an injury, for which I bring an action of this kind, it is no defence for him to say that he has not been enriched by it. The same stockholder would therefore be liable to successive actions of the same kind, by all the different holders of the bank notes ; and the defendant in the case at bar, although he received less than 1200 dollars on the division of the capital stock, might be compelled, if he has estate sufficient, to pay the whole of the notes for 90,000 dollars and upwards, which are said to be still unpaid. Thirdly, if anything could make this more strikingly unjust, it is the circumstance, that the defendant, after paying all that money, could have no remedy for contribution against the other stockholders. No such action will lie by one trespasser or wrongdoer against his companions ; but either one may, at the election of the injured party, be made liable for

the whole." The decision accordingly was, that the plaintiff could not recover.

In the case of *Spear v. Grant*,¹ the defendant, a stockholder in the Hallowell and Augusta Bank withdrew from the bank his proportion of stock, when the bank was indebted on bills which had previously issued. Some of those bills came into the hands of the plaintiff; and as the bank was broken up and dissolved, he contended that the members of the company were individually liable, on the principle that co-partners are individually liable, after the dissolution of the firm. But Mr. Chief Justice Parker, who gave the opinion of the Court, thought that no such inference could be drawn from the relation of a stockholder to the bank or its creditors. A claim like the one instituted by the defendant, he considered, would be liable to the effect of the statute of frauds and perjuries; as, most clearly, the debt was not originally the debt of the individual stockholders, but of the company; and that if any engagement existed against the defendant, or the other stockholders, it must have been collateral, and so within the principles that had been applied in the construction and application of the statute just mentioned. But he referred to other less technical difficulties, which he deemed insuperable; "If a promise," said he, "can be supposed to have been made by the defendant, or created by law, what party is the promisee? Can it be that each stockholder has promised each holder of the notes, to pay his demand, if the bank should become unable or unwilling? This would be to encounter a hazard limited only by the amount of the whole number of notes which the bank may issue. This certainly cannot be imagined to be the nature of the liability. Shall the responsibility be limited to the amount of interest which the stockholder has in the bank? If so, which creditor shall have it? He who is the sharpest and has made the first demand? Or he who has been more modest and perhaps more meritorious? Shall the original holder, who paid the value to the bank be indemnified? Or he also who, when the credit of the bank has run down, may have bought the notes for a trifle?

¹ 16 Mass. R. 9.

These questions it would certainly be very difficult to settle, if the stockholder was liable to the amount of his share of the stock only ; and if he were equally liable to each holder of the notes, (which he must be if he be liable at all ; for if the facts agreed create a promise to one, they create a promise to all,) then the most palpable injustice would take place. For a stockholder, wholly innocent and ignorant of the mismanagement, which has brought the bank into discredit, might be ruined by reason of owning a single share in the stock of the corporation. There is no view of the subject, in which we can give effect to the claim of the plaintiff."

It would be improper to omit to mention, that in the above case, the action (which was an action on the case) was considered by the plaintiff's counsel, as in the nature of a *bill in equity*, to recover no more than the amount of the stock of the corporation which had been assigned to the defendant on its dissolution. And the principle contended for was, that the stock actually vested was, by force of the act of incorporation, pledged for the payment of all the debts of the institution ; and that it ought not to be withdrawn, until all such debts were paid. But the Court observed, that even this would give actual security but for one half of the possible amount of the debt ; as all banks had the privilege of creating debts to double the amount of their capital. The stock, the Court admitted, should be considered a pledge, as far as it would go ; and if it was withdrawn before the debts were discharged, they seemed to think there was an equitable obligation, on the part of the stockholders, to account for so much as they originally consented to pledge. But they were unable to discover any mode *at common law*, by which one creditor could compel any stockholder to pay him the amount of his stock ; and were clear, if any remedy did exist to this effect, it was before a tribunal which was empowered to act upon the whole subject-matter in an *equitable* point of view. At common law they could conceive of no case in which an action would lie, without evidence of a fraudulent contrivance on the part of the person sued, to withdraw his share of the capital stock, and to cheat the creditors of the bank. What would be proper evidence of such fraud,

the Court did not, however, decide ; but they said, the present action suggested no fraud, and the facts led to the suspicion of none, against the defendant.

§ 2. We will next proceed to show, that the holder of the bills of a bank, under the above mentioned circumstances, has an adequate remedy in a Court of Equity.

In the case of *Vose v. Grant* before cited, his Honor, Judge Jackson, said ; “ In the case of this bank, a Court of Chancery would probably sustain a bill by one or more of the creditors of the bank, in behalf of all who should choose to come in, against all the stockholders. In such a process, new plaintiffs and new defendants might be added after the commencement of the suit, as might be found necessary ; and the rights of all concerned, on both sides, might be considered at once. It could then be ascertained how much was due in the whole, to all who should choose to adopt this remedy, and what had been received by each stockholder. The latter might then be compelled to pay each one his proportion of the whole debt ; provided it did not exceed the amount of his dividend ; and the money thus paid might be divided among the plaintiffs, in proportion to their respective claims. If any of the stockholders had become insolvent, it would be determined upon the same principles, as in a like case in a Court of Common Law, whether the loss arising from that circumstance should be borne by the stockholders or the creditors ; and this point being settled, the Court of Chancery would proceed to apportion the loss accordingly among the respective parties. It might also be ascertained, whether any of the present holders of the bills had purchased them at a great discount, and at a late period ; and if this circumstance ought to have any influence in estimating the amount of the debt, or in distributing the money to be paid by the defendants, that Court would be competent to make the distribution accordingly.”

The case of *Wood v. Dummer*,¹ which also grew out of the insolvency and dissolution of the *Hallowell and Augusta Bank*,

¹ 3 *Mason, C. C. R.* 308.

has fully established the jurisdiction of a Court of Equity under the circumstances above mentioned. That case was a bill in equity, brought by the plaintiff in the Circuit Court of the United States before Mr. Justice Story, in Maine, at the May Term, 1824. The plaintiff brought the bill, as holder of the notes of the bank aforesaid, against certain stockholders in the same bank. It was held by the Judge, that, upon general principles, as well as according to the legislative intention, the capital stock of banks was to be deemed a *pledge*, or *trust fund*, for the payment of the debts contracted by the bank ; that the public, as well as the legislature, had always supposed this to be a fund appropriated for such purpose. That the charter relieved the individual stockholders from personal responsibility, and substituted the capital stock in its stead ; and that to this fund credit was universally given by the public, as the only means of repayment. During the existence of the corporation, he said, it was the sole property of the corporation, and could be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it might discount and circulate notes. If the stock, he continued, might, the next day after it was paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required ? The point appeared to his Honor so plain upon principles of law, as well as common sense, that he could not doubt, that the charters of our banks made the capital stock a trust fund for the payment of all the debts of the corporation. The bill holders and other creditors, he considered, had the first claims upon it ; and the stockholders had no right, until all the other creditors were satisfied. He viewed the stockholders as having the full benefit of all the profits made by the establishment, and as being unable to take any portion of the fund, until all the other claims on it were extinguished ; and that their rights were not to the capital stock, but to the *residuum*, after all demands on it were paid. He admitted, that upon the dissolution of the corporation, both the bill holders and the stockholders had each equitable claims ; *but those of the bill holders possessed, as he conceived, a prior exclusive equity.* On the

principle, then, the capital stock was a *trust fund*, it was clear, that it might be followed by the creditors into the hands of *any* persons, having notice of the trust attached to it ; and that, as to the stockholders themselves, there could be no pretence to say, that, both in law and fact, they were not affected with the *most ample* notice. His Honor then referred to the well settled doctrine of following trust funds into the hands of any persons, who were not innocent purchasers, and did not otherwise possess superior equities ; though he considered, upon the plain *import of the charter*, the capital stock was a trust fund for creditors, and that the stockholders, upon the division, took it subject to all equities attached to it."¹

Another important question considered by Mr. J. Story, in the above mentioned case, was, whether the plaintiffs were entitled to a decree, to the *full amount* of the dividends received by the defendants respectively, toward payment of the debts due from the bank to them, or, whether they were entitled only to a *pro rata* payment out of that dividend, in the proportion which the stock, held by the defendants, bore to the whole capital stock. In considering this question, he alluded to the defective manner in which the bill was drawn, and that it contained no averment of the insolvency of the other stockholders, or of other circumstances denoting a peculiar equity. He also alluded to the long delay in instituting the suit, which was not accounted for in any

¹ The Judge referred to the following case in Skinner, R. 84, as one which was very like the one before him in many of its circumstances. It was the case of *Curson v. African Company*, which is also reported in 1 Vernon, 121. The plaintiff, in that case, was a creditor on bond of the old African Company, which became insolvent, but did not surrender its charter, and a new Company was incorporated, consisting for the most part of the old members, to which the old Company assigned its effects for payment of its debts. The suit was against the new Company for payment of the plaintiff's debt out of these effects, as a *trust fund*. The difficulty was, that the old Company was not made a party to the bill. Lord Keeper North had some hesitation about the necessity of issuing process against the old Company, because they had no property, on which a *distringas* could issue to compel them to appear. But he seems to have had no doubt of proceeding, if the Company was dissolved, nor of operating on the fund itself.

averments framed for that purpose. It was possible, and probable, he said, that there had been intermediate insolvencies of some of the stockholders, and that injustice might arise to other creditors not before the Court, unless it was guarded against by the decree. His conclusion accordingly was, that the duty of the Court "was best performed by holding the plaintiffs entitled to a decree, that the defendants pay out of the dividends of the capital stock, received by them, so much of the debts due to the plaintiff, as the number of shares held by them in the same capital stock (viz. 320 shares) bears to the whole number of shares in the capital stock (viz. 2,000 shares)." It seems that in Vermont, not only the corporation, but the members composing it are individually liable in chancery, if they do not appropriate their money to payment of their debts, or if they permit their property to be wasted.¹

§ 3. The statute books of many of the States will show that an opinion has strongly and extensively prevailed, that the common law relative to commercial corporations, is not adequate to their proper regulation and government. One of the most material alterations of the common law introduced for the better regulation of such corporations, and for the security of their creditors, is that of making each member personally liable in his private estate for the company debts.

It has been the policy of the legislature of Massachusetts, from the year 1809 to 1827, to increase the liability of the individual stockholders in manufacturing corporations, for the debts of the corporation.² The earliest general statute on the subject was passed in 1809; though previously, one or two acts of incorporation contained similar provisions. By this act it is provided, "that when any action shall be commenced against any corporation that may hereafter be created, or whenever any execution may issue against such corporations on any judgment rendered in any civil action, and the said corporation shall not within fourteen

¹ *Bigelow v. Con. Society*, 11 Vermont R. 283.

² See *Am. Jurist*, Vol. II. p. 95.

days after demand thereof made upon the president, treasurer, or clerk of such corporation, by the officer, to whom the writ or execution against such corporation has been committed to be served, show to the same officer sufficient real or personal property, or estate to satisfy any judgment that may be rendered upon such writ, or to satisfy and pay the creditor the sums due upon such execution, then, and upon such neglect and default, the officer, to whom such writ and execution may have been committed for service, shall serve and levy the same writ or execution upon the body or bodies, and real and personal estate of any member or members of such corporation."

The above act, we are told,¹ did not satisfy the Massachusetts legislature; and in 1818,² a new statute was passed, which provides, "that whenever any action shall be commenced against any manufacturing corporation, that may hereafter be created, or whenever any execution may issue against such corporation, on any judgment rendered in any civil action, and the said corporation shall not, before the day on which the said execution is returnable, after demand thereof made upon the president, treasurer, or clerk of such corporation, by the officer to whom the writ or execution against such company has been committed to be served, show to the same officer sufficient personal estate to satisfy any judgment that may be rendered upon such writ, or to satisfy and pay the creditor the sums due upon such execution, then, upon such neglect and default, upon the issuing of an *alias* execution, the officer, to whom such execution may be committed for service, may serve and levy the same writ and execution upon the body or bodies, and real and personal estate or estates of any member or members of such corporation, or upon the body or bodies, and upon the real and personal estate of any person or persons, who were members of said corporation, at the time when the debt or debts accrued, upon which such writs or executions may have issued."³

¹ Ibid.

² Mass. St. 1818, c. 183.

³ "We cannot forbear noticing," says a writer in the *American Jurist*, (Vol. II. p. 97,) "the very slovenly manner in which this statute is drawn.

By a subsequent statute of Massachusetts, it is enacted, "that every person, who shall become a member of any manufacturing corporation which may hereafter be established within this commonwealth, shall be liable, in his individual capacity, for all debts contracted during the time of his continuing a member of such corporation."¹

Such was the state of the laws of Massachusetts, respecting what is called "personal responsibility" of members of corporations, until 1827, when the legislature, by a statute,² changed in some measure the nature and duration of this responsibility. The statute referred to enacts as follows.

"§ 1. That no member of any manufacturing corporation, and no person who shall have been such member at the time when any debt may have been contracted by such corporation, or at the time when any debt so contracted may have accrued, shall hereafter be liable in his individual capacity for any such debt, unless a suit shall have been commenced therefor, and prosecuted against such corporation, within one year after such debt shall have become due, and unless a suit therefor shall be commenced against

It would seem from the words of the statute, which speaks, in the beginning, of an action being commenced, and couples the words '*writ* and execution,' together several times, that it proposed to give some power on the original writ, yet no power is given; and though the demand is made on the original writ, yet no authority to do any thing is still given till an *alias* execution. And persons who are members of the corporation at the time when the debt accrued, but who are not members when the suit is brought, appear, as we at first thought, to be only liable on an *alias* execution, not on the writ, nor on the first execution, nor on a *pluries*. If the propriety of making such persons liable at all be admitted, no reason can be perceived why their liability should be confined to an *alias* execution. On looking more closely at the words of the statute, although no power is given until the issuing of the *alias*, it seems to be left uncertain whether the *alias* itself is to be served on the individual members, or whether the original writ or the prior execution, on which the demand was made, and which would be defunct in the common course, are not to be revived for the purpose of serving them on the individual members."

¹ Mass. St. 1821, c. 38.

² Mass. St. 1826, c. 137.

such person, having been a member as aforesaid, within one year after he shall have ceased to be a member.

“§ 2. Any person whose real or personal estate shall have been levied on for payment of the debt of such corporation, or who shall have paid any such debt on execution, shall have an action at law or in equity in the Supreme Court, for contribution against the other members of such corporation, and persons having been members as aforesaid ; or he may, at his election, have an action at law against the corporation.

“§ 3. Any corporation already established may adopt this law by vote, publishing the vote and the act in one or more Boston papers, in which the laws of the commonwealth are published, and in one or more of the newspapers of the county where the corporation has its manufacturing establishment, or if no newspaper in the county, in one of the nearest county ; and provided this adoption shall not affect any liabilities existing at the time of the adoption.

“§ 4. The provisions of this and former acts on the same subject, shall not be construed to render personally liable for the debts of such corporation persons holding stock as *executors, administrators, guardians, or trustees, nor any persons holding stock as collateral security*. But the persons pledging the stock are to be liable as members, and to be considered as members for the purpose of voting and transacting business.

“§ 5. Repeals all acts as far as inconsistent with this, except with regard to such existing corporations as do not adopt this.”¹

¹ This statute is commented on by the writer to whom we have before referred, in the *American Jurist*, as follows ; “The first section provides that no person shall be liable for a corporate debt, unless a suit therefor shall be commenced against such person, having been a member as aforesaid, within one year after he shall have ceased to be a member. None of the previous acts provide for such a suit ; they all specify the cases in which the bodies or property of individual members may be taken ; but it is always on a suit against the corporation, not against the individual. Nor does this statute give any action against the individual members, unless it is given by implication in this clause. The question then arises, whether any action against

It is worthy of remark, it has been said, that this unlimited personal responsibility of members of commercial corporations

the individual stockholders be in fact given, and if so, what is the form of the action? Is it debt, or the same action which could be maintained against the corporation; is it a suit in equity, or at common law; is it a several action against every person liable, or a joint action against more than one; must all the persons liable be joined in one action or not; when may the suit be brought; can it be brought simultaneously with a suit against the corporation, or not until after judgment has been rendered against the corporation? If an action is not thus given by an implication, the condition of the liability, that is, the suit against the individual, being precedent and impossible, is any individual responsibility created?

The second section of the statute gives the person who pays the corporate debts a right of action against the corporators individually, or the corporation, *at his election*. It seems to us that his remedies ought to be cumulative, both against the corporation and the individual members also.

With regard to the third section, it appears to us that if any publication of assent was necessary, in order to entitle corporations to the benefit of the act, it could hardly be necessary to require every one of them to publish the whole act at length.

The propriety of exempting executors, administrators, guardians, and trustees, from any personal responsibility, is obvious. A further effect of this act is perhaps to exempt the estates of deceased persons, as well as their executors and administrators from any liability for the debts of corporations contracted subsequently to the death of the testators and intestates; and it seems also that *cestui que trusts*, as well as their trustees, are not subject to any personal responsibility. It would be perhaps a great hardship to those who are beneficially interested in the estates of deceased stockholders, to make these estates liable for the debts of the corporations over which they have no control, where the debts are contracted subsequently to the death of the stockholders. But notwithstanding this hardship, which we acknowledge, we do not see why the estate of a deceased stockholder should not be as liable as that of a living one. The law continuing the partnership after death, and thus entitling the estate of the deceased to share in the profits, if any are realized, ought, one would think, to make it liable to share in the losses. Exempting trustees and their *cestui que trusts* both from responsibility appears liable to some exception, as it affords a very convenient mode of evading the whole operation of the statutes on the subject, and of one of which, we believe, advantage has already been taken. Indeed we do not see why the estate of the *cestui que trust*, who is beneficially interested in the corporation, should not be liable in the same manner as that of any stockholder."

is peculiar to Massachusetts.¹ This is perhaps true as regards *general statutes* imposing an unlimited responsibility. There are some instances in Connecticut, which occur to us, of the imposition of such liability by an act incorporating a particular company; the act referred to providing, "that the persons and property of the members of the corporation shall at all times be liable for all debts due by said corporation."²

In Massachusetts an unlimited personal responsibility is confined to *manufacturing* corporations. The private property of the president and directors of every insurance company is, it is true, in Massachusetts made liable for losses on policies which they subscribe after the whole capital of the company is exhausted; and so the directors of banks in that State are liable in their private capacity for any excess of debts due from the bank beyond the amount authorized by law. The same provision has been adopted in the charters of banks in New-York, Maryland, and South Carolina. In case of any deficiency of capital in any bank in Massachusetts, arising from the official mismanagement of the directors, the stockholders are, in their individual capacities, liable to pay the same; but no stockholder is liable to pay an amount exceeding the amount of his stock. The stockholders in every bank at the expiration of its charter are also chargeable in Massachusetts, in their individual capacities, for the payment of all bills of the bank remaining unpaid, in proportion to their stock. In New-York, directors of moneyed corporations are personally liable in case of violating the laws regulating them, or of a fraudulent insolvency. In Maine, where a part of the Massachusetts laws were in force, when the state of Maine was separated from Massachusetts, members of corporations have since been exempted from a personal liability for corporate debts, in case of the corporation's complying with the provisions of the act.³

¹ American Jurist, ut supra, 101.

² *Middletown Bank v. Magill*, et al. 5 Conn. R. 28; and see *Southmayd v. Russ*, 3 Conn. R. 52, where it was held, that under such a charter the members were liable in an original manner, as if no incorporation had been had, and therefore no *scire facias* could be maintained against them on a judgment against the corporation.

³ Laws of Maine, c. 221, passed Feb. 5, 1823. And see *Am. Jurist*, vol. ii. p. 102.

It is stated, that the effect of imposing an unlimited responsibility upon the members of manufacturing corporations in Massachusetts has been, to drive millions of capital into the neighboring states, for investment.¹ The legislature have recently set themselves about alleviating this public injury, and at the same time affording an adequate security to creditors. We refer to the Massachusetts act of 1830, entitled "An act defining the general powers and duties of manufacturing corporations." The substance of this act is, that each and every member shall be jointly and severally liable for all the debts, until the whole amount of the capital stock shall have been actually paid in, and not afterwards; or not after a certificate, signed and sworn to by certain of the officers of the company, that a member has contributed his full share of the stock, has been recorded in the registry of deeds in the county wherein the manufactory shall be established. The act also provides, that if such certificate be wilfully false in any material representation, then all the officers, who have signed the same, shall be liable personally for all claims and demands against the corporation, which were created while they were members. And if the president and directors of any such corporation shall declare and pay, or cause to be declared and paid any dividend, such corporation being at the time insolvent, or if payment of such dividend would render it insolvent, they are all (with the exception of those who protest against it) made personally liable for the full amount of such dividend so declared and paid.

The liability of stockholders of joint stock incorporated companies has been the subject of frequent attention in the State of New-York. In that State, an act relative to manufacturing corporations, passed in 1811, declares, "that for all debts, which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in the said company, and no further." Some of the charters of companies, since incorporated in that State, contain a provision, that the stockholders "shall be holden, in their individual capaci-

¹ American Jurist, vol. iv. p. 307.

ties, responsible jointly and severally for the payment of all debts contracted by the said company to the nominal amount of the stock held by such stockholders respectively; and any person having any demand against the said company may sue any stockholder singly, or any two or more stockholders thereof jointly, and recover in any court having cognizance thereof; *provided* such suit shall not be maintained without proof, that such demand had been presented to the proper officer of said company for payment thereof, and the payment thereof neglected or refused. The revised laws of New-York, in the regulations respecting moneyed corporations, provide, that each stockholder shall be liable rateably for corporate debts, but not to an amount exceeding the nominal amount of his shares.¹ In Rhode Island, it is provided, in the

¹ Extracts from Revised Statutes, vol. 1, chap. 18, p. 592, 593. "Of Incorporations." Title 2d, Article 1st.

"§ 14. Every insolvency of a moneyed corporation shall be deemed fraudulent, unless its affairs shall appear upon investigation, to have been fairly and legally administered, and generally, with the same care and diligence, that agents, receiving compensation for their services, are bound by law to observe; and it shall be incumbent on the directors and stockholders of every such insolvent corporation, to repel by proof the presumption of fraud.

"§ 15. In every case of a fraudulent insolvency, the directors of the insolvent company, by whose acts or omissions the insolvency was wholly or in part occasioned, and whether then in office or not, shall each be liable to the stockholders and creditors of the company, for his proportional share of their respective losses; the proportion to be ascertained by dividing the whole loss among the whole number of directors liable for re-imbursement; but this section shall not be construed to diminish the liability of directors, as before declared, who shall have violated or have been concerned in violating the provisions of this article.

"§ 16. If the moneys, remaining due to the creditors of a corporation whose insolvency shall be adjudged fraudulent, after the distribution of its effects, shall not be collected, in whole or in part, from the directors liable for their re-imbursement, the deficiency shall be made good, by the contribution of the stockholders of the company; the whole amount of the deficiency shall be assessed on the whole number of shares of the capital stock, and the sum necessary to be paid on each share shall be then ascertained, and each stockholder shall be liable for the sum assessed on the number of shares held by him, not exceeding the nominal amount of such

latest bank charters, that in case of default and mismanagement on the part of the directors, and of a want of corporate property to pay the corporate debts, the members of the company shall be individually responsible for such debts.

§ 4. We now proceed to consider the new and peculiar class of cases, that owe their origin to the statutes we have referred to in the preceeding section, imposing a responsibility upon the members of a private corporation, in case of the neglect of the corporate body to pay the demands which it has incurred. This individual liability creates a new and peculiar kind of corporations. They are in effect (as was observed by Chief Justice Spencer, in *Slee v. Bloom*,)¹ “mere partnerships, with *some* of the powers and privileges of corporations ; they are, in some respects, the corporations of the English law, but they bear a great resemblance to the corporations of the civil law, which were voluntary associations.” Where it is provided, in an act creating such a corporation, that the individuals composing it shall be liable, at the time of the *dissolution* of the company, for the debts *then* due, an inability of the company, by reason of a total want of funds, to exercise its corporate powers, will be deemed a dissolution. That is to say, it is not necessary in such a case, that the corporate rights should be regularly adjudged forfeited by any tribunal, before a creditor can maintain a suit against a stockholder. The government has no interest in dissolving a manufacturing or trad-

shares, in addition to the sums paid, or which he may be liable to pay, on account of those shares.

“§ 17. If the amount assessed on the shares of any stockholder, under the provisions of the last section, shall not be collected from such stockholder, by reason of his insolvency, or his absence from this State, the sum remaining due on such assessment shall be recoverable against the person, from whom the delinquent stockholder, at any time within six months previous to the insolvency of the company, shall have received a transfer of the shares, or any portion of the shares held by him ; and every person having made such transfer shall be liable in the same manner, and for the same proportion, that he would have been liable, had he continued to hold the shares so transferred.”

¹ 19 Johns. (N. Y.) R. 473.

ing corporation, and it is not within the control of the creditors of the company to proceed by *scire facias*, and information of the nature of the writ of *quo warranto*, in order to obtain a judgment, that a corporation has forfeited its franchises. The case of *Penniman v. Briggs* in the court of chancery of the State of New-York,¹ fully supports these positions. In that case it was decided, that a corporation for manufacturing purposes, formed under the act of 22d March, 1811, having ceased to act as a manufacturing company, and being without funds, and indebted, was dissolved, within the intent of the act, so as to give a remedy to creditors against the individual stockholders. And it was further held, that an election of trustees, made apparently for no purpose but to keep the company in existence, did not prevent such dissolution. The true question, as his Honor the Chancellor considered, was, whether the company was not dissolved, in the sense of the statute authorizing its creation. The statute, he said, contemplated the dissolution of the company, as an event which might occur, within the time prescribed for its existence; and the remedy given to creditors against stockholders was evidently intended for every mode of dissolution, which might deprive a creditor of an effectual remedy against the corporate body. According to the construction which has been given to legislative acts, which create a personal responsibility upon the individuals of an incorporated company for the debts of the company, a judgment, obtained against the company for a debt contracted by an *agent* of the company, is binding upon any one of the stockholders.

In the case of *Slee v. Bloom et al.* in the Court of Errors of the State of New York,² it appeared that the respondents associated together for establishing a cotton manufactory, and became a corporation for twenty years, according to the provisions of an act passed in March, 1811, the seventh section of which declared

¹ 1 Hopkins, (N. Y.) Chan. R. 300.

² 20 Johns. (N. Y.) R. 66. The original case in Chancery will be found in 5 Johns. (N. Y.) Ch. R. 366; and proceedings on appeal also in 19 Johns. (N. Y.) R. 456.

“that for debt which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in said company. The corporation in November, 1816, executed a bond to the appellant, under their corporate seal, on which a judgment was obtained in May, 1817. The corporation having been dissolved in February, 1818, it was held that the judgment debt of the corporation was binding and conclusive on the respondents individually, to the extent of their respective shares. The Chancellor had, however, previously decided, that the judgment was not conclusive upon the respondents in their individual capacities, on the ground, *that the acts of trustees, while the corporation subsisted, however binding on the corporation and its property, were not binding upon the individual stockholders.* The Court of Errors, on the other hand, could perceive no escape from the conclusion, that the respondents were individually liable, to the same extent that the company itself was liable. And it was said by Chief Justice Spencer, that “whatever was a debt against the company, is now, by force of the statute, a debt against them ; and if the company itself was concluded, the respondents are equally concluded. As an abstract proposition, he said, it was undoubtedly true, that the trustees of the company were not the trustees or agents of the individual stockholders. The trustees could not bind the individual members beyond the funds of the company, with this qualification, that they could bind the individual stockholders in the event of the dissolution of the corporation, to the extent of their respective shares, and no further.”

By an act of the State of New Hampshire establishing the Hillsborough bank, it was enacted, that if the corporation should neglect or refuse to pay any of their bills, when presented for payment, “the original stockholders, their successors or assigns, and the members of the said corporation” should be jointly and severally holden for the payment of them ; and that the members, compelled to pay, should be authorized to recover of the remaining members of said corporation their proportion of the sum paid. The Supreme Court of Massachusetts, in expounding this law,

in the case of *Bond v. Appleton*,¹ said, that the words of the law were very extensive, but that it was the reasonable construction of them, that *such* of the original stockholders, their successors, and assigns, as should be members *when the payment of the bills should be refused*, were bound to make satisfaction. This construction, the court thought, was warranted by the remedy furnished to the members against the *remaining* members.

In Massachusetts, it was enacted by the statute of 1808, that whenever any execution shall issue against any manufacturing corporation thereafter created, and such corporation shall not, within fourteen days after demand made upon the president, treasurer, or clerk of such corporation, by the officer holding the execution, show to him sufficient real or personal estate, to satisfy and pay the sums due on such execution, the officer shall serve and levy the same upon the body or bodies, and real and personal estate, of any member or members of such corporation." Although the statute made the estate of *any member or members* liable, yet in the opinion of the Supreme Court, the statute applied to such as were members *at the time of the commencement of the action*, and to them only.² As that statute did not by itself render the estate of a deceased member liable for the corporate debts, his administrator cannot be allowed, in a probate account, for money paid to make up a deficit, where the corporate funds, on closing the concerns of the corporation, are found insufficient.³ Under this act no action can be maintained against a stockholder or his administrator to recover assessments.⁴ By the Massachusetts statute of 1817, c. 183, the legislature provided, that the bodies and estates of those, who were members at the time any debt accrued, as well as those who were members when the execution issued, should be liable.⁵ The liability of members under these statutes is several, and not joint, or in the nature of a guaranty; and a member, who voluntarily pays a

¹ 8 Mass. R. 472.

² *Child v. Coffin et al.* 17 Mass. R. 64.

³ *Ripley v. Samson*, 10 Pick. (Mass.) R. 371.

⁴ *Cutler v. Middlesex Factory Co.*, 14 Pick. (Mass.) R. 483.

⁵ Per Parker, C. J., in *Marcy v. Clark*, 77 Mass. R. 335.

company debt for which all are liable, has no claim upon the other members for contribution.¹ But where the members voluntarily agree to reimburse to each other such sums as they may respectively be obliged to pay, in consequence of indorsing the notes of the corporation, they have a remedy for contribution on such agreement.²

In an act of the legislature of Connecticut, incorporating a manufacturing company, with the usual powers of such a corporation, it was provided, that *the persons and property of the members of the corporation should, at all times, be liable for all debts due by said corporation.* This clause would certainly seem to include those persons who were members at the time the debt was contracted, but who had transferred their stock before the commencement of the suit. A majority of the Supreme Court of Errors of Connecticut were, however, of a different opinion, and they accordingly so decided in the case of the President, Directors, &c. of the Middletown Bank v. Magill and others;³ but the decision was contrary to the opinion of Hosmer, C. J., and Brainard, J. The former maintained that such a construction should be given to the act, as would meet the mischiefs contemplated by the legislature, and impart that security to creditors, which was demanded by reason and justice. That the liability to debt should be cast on those who should happen to be members at the commencement of the suit, was a construction for which he was unable to perceive any sufficient ground. It was not warranted by the words of the proviso construed with reference to the subject matter, and it gave a strict interpretation against creditors in the very particular, in which the construction should be liberal in their favor. It was opposed to the equitable right of creditors to look for payment to those who are alone visible to them, and whom they alone could credit; and it referred them to *future* members, whom they could by no possibility

¹ Pratt v. Bacon, 10 Pick. (Mass.) R. 127; Andrews v. Callender, 13 Pick. (Mass.) R. 484.

² Andrews v. Callender, 13 Pick. (Mass.) R. 484.

³ 5 Conn. R. 28.

know or trust. Chapman, J., on the contrary, (and the majority of the Court concurred in his opinion,) was clear, that it could not have been the intention of the legislature, by the proviso referred to, so to shackle and embarrass the corporation as to render their charter worse than useless.¹ The members of a corporation, made by statute individually liable as common carriers at common law, are responsible to the same extent, and in the same manner, as though there had been no act of incorporation.²

Where corporators are made personally responsible by charter for debts contracted "during the time they hold stock," those, who are members at the date of a note given for a pre-existing debt, are liable, and not those who may have been liable when the original debt was contracted.³ In Kentucky a judgment, execution and return of no property, in a suit against a corporation, is sufficient ground for proceeding against the stockholders personally.⁴ Where by the terms of the charter of a joint stock company, the stockholders are individually liable for the corporate debts to the nominal amount of their stock, a party, who subscribes for a certain number of shares of the stock, is liable for the debts of the company to the nominal amount of the stock subscribed by him, although he has not paid in any part of his subscription, or done any act whatever as a stockholder of the company.⁵ The stockholders of an incorporated company are not individually responsible for damages, occasioned by the non-repair of a bridge built by the company : although by the terms of the act of incorporation an action is given against them for any demand against the corporation ; the act contemplating liability, only for demands *ex contractu*.⁶ It was held in New York, that in a proceeding by attachment against a non-resident debtor, who is sought to be charged as a director of a foreign bank, the president and directors of which are by charter declared to be individually

¹ Middletown Bank v. Magill et al. 5 Conn. R. 28.

² Allen v. Small, 2 Wend. (N. Y.) R. 327.

³ Castleman v. Holmes, 4 J. J. Marsh. (Ky.) R. 1.

⁴ Bank of United States v. Dallam, 4 Dana, (Ky.) R. 574.

⁵ Spear v. Crawford, 14 Wend. (N. Y.) R. 20.

⁶ Heacock v. Sherman, Ibid. 58.

liable for all notes, &c. issued by the bank, it is not necessary, for the purpose of showing personal liability, that the charter should be produced as part of the preliminary proofs on application for the process.¹ On motion to set aside the attachment, the Court will inquire into his liability, and will hold him personally liable if the charter declares him so.² It is no objection to the remedy by attachment, that the charter gives another remedy. A party, to whom an action is thus given, is not confined thereto, but may resort to any remedy known to the law in any place in which the debtor or his property may be found.

But however strictly the personal responsibility imposed upon the members of an incorporated company may be construed against creditors, there is one point which is very clear, and that is, no member can exonerate himself from his liability, and defeat the claims of creditors, by transferring his interest to a *bankrupt*. This was expressly admitted by the Court in the case just cited, who said that no principle was better settled, than that a conveyance made, with an intention to defeat a creditor, is void. The members of a corporation, therefore, who would be liable, if they continued members, to the creditors of the corporation, may still be treated as members, if they have disposed of their interest with the view merely of exonerating themselves from their personal responsibility. In the case of *Marcy v. Clark*, in Massachusetts,⁴ the question arose as to whether M. was a member of the company *at the time* the goods were taken. It appeared, that before the execution was levied, he had made a bill of sale of his share to one E., without adequate consideration, and for the express purpose, as found by the jury, of avoiding his liability to the execution as a member of the corporation. It was contended that he had a right thus to shift the burthen from himself, and to give away his shares, if he chose. But Parker, C. J. said ; “ It is very true, every man may dispose of his own property as he

¹ *Ex parte Van Riper*, 21 Wend. (N. Y.) R. 614.

² *Ibid.*

³ *Ibid.*

⁴ 17 Mass. R. 330. Under the Massachusetts Statute of 1817, even a *bona fide* transfer of shares will not relieve the member from any debt which occurred while he was a member of the corporation. *Ibid.* 335.

pleases ; but always subject to the equitable principle, that he is not to injure another by his gift." And he entertained no doubt that a transfer of an interest in the stock of a corporation for the debts of which the members were personally liable, for the purpose of defeating the creditors of the corporation, was fraudulent and void. If it were otherwise, he said, the wholesome provision of the statute for the security of creditors of the company, would be unavailing, at the very time, and in the very circumstances, in which it was intended to operate. And so it has been held in Kentucky, that if one subscribes for stock, in the name of minors, for the purpose of avoiding personal responsibility in case the corporation becomes insolvent, and receives the benefit of the stock, he will be liable for the corporate debts.¹

§ 5. Before we close the subject of the preceding section, it may be proper to refer to the remedies, which the creditors of an insolvent incorporated company have against the members of the company, where a personal responsibility has been imposed by an express act of the legislature. The members in such a case, it will be observed, stand in the same relation to creditors, as the individuals who compose a simple co-partnership. The creditors of the latter, although they have a remedy at law, yet if that remedy is defective, may call in aid the interference of a court of equity.² Where the charter of a bank makes the stockholder personally liable, an action of debt lies against him in favor of the holder of a dishonored bank bill.³ The same rule, as to an election of legal and equitable remedies, will apply to the members of a corporation who are made personally liable for corporate debts ; that is, although a creditor can enforce a contribution at law, yet

¹ *Roman v. Fry*, 5 J. J. Marsh, (Ky.) R. 634.

² *Gow* on Part. 258. By the general mercantile law, a partnership contract is *several* as well as *joint*, and courts of equity, adopting, to its full extent, that law for their guidance, have considered joint contracts, which are in the nature of partnerships, as standing upon a different footing from *ordinary* joint contracts ; and have ascribed to them a *several* as well as *joint* operation.

³ *Ballard v. Bell*, 1 Mason, C. C. R. 243.

as he may not be able to do it without numerous suits, his case would be a case of equitable jurisdiction. This was expressly held in *Penniman v. Briggs*, in the Court of Chancery of the State of New-York.¹

§ 6. There is no question respecting the constitutional authority of a State legislature, to enact a law requiring, that those who shall become members of corporations shall be individually liable in their bodies and estates, to an execution obtained against the body corporate.² Such laws have, however, been objected to in Massachusetts, as infringing some of the principles of the constitution, and particularly two of the articles of the declaration of rights of that State; the first of which is intended to secure the liberty and property of the citizen, and the second to establish the right of trial by jury. The laws in question, it has been contended, authorize a man's estate or body to be taken on execution, without any judgment against him, and without any hearing in the action, upon which the judgment was rendered. If the fact were so, the laws undoubtedly would be void. But all who are members of the corporation are virtually defendants in the action, and have an opportunity to be heard, in the form they have chosen by joining the company. As to those who become members after judgment against a corporation, or after the debt has accrued, they voluntarily subject themselves to the inconvenience, having the means to satisfy themselves of the solvency of the company, if they choose to make the inquiry.³

§ 7. The practice, of making the members of a corporation personally liable for the debts of the company, originated in a general distrust of the community of companies incorporated for

¹ 1 Hopkins, Chan. R. 305; and see also *Wood v. Dummer*, 3 Mason, R. 308; and *Briggs v. Penniman*, 8 Cowen, (N. Y.) R. 787.

² *Child v. Coffin et al.*, 17 Mass. R. 64. In this case, the Court say; "Considering the well known condition of many of the manufacturing corporations in the State, the necessity of legislative interposition, for the safety of their creditors, cannot be doubted."

³ Per Parker, C. J., in *Marcy v. Clark*, 17 Mass. R. 335.

carying on trade. Perhaps, says Chief Justice Parker, in the case of *Spear v. Grant*,¹ "nothing could show more conclusively the public opinion, that individuals were not answerable by the principles of the common law, than this reluctant establishment of the liability by the legislature. It used to be inquired, what prudent man would hazard his property in an institution, if it should be subject to forfeiture and loss, by the misconduct and fraud of those directors and officers, over whose conduct a single stockholder could have so little control? And it was said, that those who deal with banks, and take their bills, confide altogether in the credit of the corporation, and not in that of individuals. Whether this reasoning was correct or not, it certainly had its influence on the legislature, until it was discovered that corporations were liable to the same misfortunes in the course of their business, and were as subject to the consequences of the mismanagement, indiscretion, or even fraud of their agents, as individual merchants or traders."

On another occasion, Mr. Chief Justice Parker observed as follows; "The legislature have thought fit, and we think wisely, to subject the property of all members of these (manufacturing) corporations to a liability for the debts of the company. By this, in fact, they only continue the principle of *co-partnership* in operation; and considering the multitude of corporations, which the increasing spirit of manufacturing gives rise to, regard to the interests of the community seems to require that the individuals, whose property, thus put into a common mass, enables them to obtain credit universally, should not shelter themselves from a responsibility, to which they would be liable as members of a private association."²

The imposition of a personal responsibility upon each member for every debt incurred by the company, however well adapted it may be to secure the company creditors, yet it goes, it has been thought, to rob the public of many of the benefits resulting from the establishment of associations existing by the authority of cor-

¹ 16 Mass. R. 9.

² *Marcy v. Clark*, 17 Mass. R. 334.

porate charters.¹ It is no more than reasonable to expect that persons, who have had sufficient prudence to acquire a capital, will not in general show so much imprudence as to invest their capital in the stock of an extensive company, the members of which, as to personal liability, stand upon the same footing precisely as common co-partners. It is not our business, however, to enter into an argument on this subject; but for an able argument intended to expose the impolicy and the injustice of so extended a liability, we refer the reader to the second volume of the *American Jurist*, p. 102, *et seq.*

In the state of New York, the example of some of the continental countries of Europe has been followed, of encouraging capitalists to invest their money for the prosecution of extensive and useful projects, by the establishment of what are called *limited partnerships*.² In relation to an *ordinary* partnership, there is no rule, as we presume our readers are aware, more firmly established, than that no participator in its profits can shield himself from the liability for the whole amount of the debts by any private arrangement, or stipulation. A very striking instance of the effects of an adherence to this stern rule occurred in Scotland, in the case of the *Douglas Bank*. The bank just named was established, says Mr. Bell,³ “for the generous but short-sighted purpose of relieving the distresses of the country, occasioned by the excessive use of bills of exchange, and the stop in the usual discounts to which the regular banks were forced to have recourse.” After the bank had been established a little more than two years, it failed with a loss of £430,000. Many of the stockholders were eminent lawyers, and raised every possible point, in order to shield themselves and families from the ruin which impended, from the personal responsibility of the members of a company so circumstanced. But, although it was questioned, whether, after the insolvency of the company, a committee of the

¹ *American Jurist*, Vol. 4, p. 307.

² As to the meaning of a Limited Partnership, see *ante*, p. 24. The statement on p. 24, that Limited Partnerships are authorized in Pennsylvania, is not correct. We were misinformed on the subject.

³ See 2 Bell, *Comm.* 263.

company could raise contributions for the payment of the debts ; it was never for a moment imagined, that the partners were not responsible for the last fraction of the debts.

An ingenious attempt was once made in the State of Pennsylvania, to evade the rule as to the personal responsibility of partners, beyond the amount of shares for which they subscribed. In the case of *Werts v. Hess and others*, as partners, under the name of " Farmers and Mechanics Bank of Fayette County, Pennsylvania,"¹ the defendant in error sought to recover the amount of certain notes issued by that association. The association was not incorporated, but by the terms of their notes, engaged to pay " out of their joint funds, according to their *articles of association* ; " and it was made a part of their case, that they had no joint funds. The question was, whether they were compelled to pay out of their *separate estates*. The opinion of the Court was, that each and every member of the association were personally liable, on the general principle, that partners are as liable for partnership debts, as they are for debts contracted personally ; and that it was not merely the stock which they brought into the partnership which was hazarded, but their individual fortunes.

It seems that the greater part of the Fire and Life Insurance Companies in England are without charters of incorporation. The articles of agreement of those companies are, however, peculiar ; for instance, the capital is divided into a certain number of shares, whereof each partner may hold one or more, but restricted to a certain number ; any partner can transfer his share, and the execution of the business is committed to a body of Directors. Those companies (not being incorporated) are nevertheless liable to the same law as more private partnerships ; and the members thereof are personally responsible beyond the amount of their shares.²

A very different policy is pursued on the continent of Europe. In France, besides the *limited* partnerships to which we have be-

¹ 4 Serg. & Rawle, (Penn.) R. 356 ; and see *Myers v. Irwin*, 2 Serg. & Rawle, (Penn.) R. 368.

² *Rex v. Dodd*, 9 East, 516 ; and *Gow* on Part. ch. 1.

fore referred, (and which are so called because they limit the responsibility of private contributors to the stock, to the funds, which they bring or agree to bring into the general funds,) there is another sort of partnership entitled *societe anonyme*. In the French Commercial Code there are the following provisions on this subject ; “ The anonymous partnership does not exist under a partnership name, or the name of any of the co-partners. Its name is regulated by the object for which it is established. It is conducted by agents appointed for a limited time, who may be dismissed, and who may be in partnership or not, and salaried or unpaid. The agents are only responsible for the execution of the service committed to them, and do not contract by their agency any personal obligation with regard to the contracts of the partnership. The partners are only liable to lose the amount of their interest in the partnership. The capital of the partnership is divided into shares and even parts of shares, of equal value. The share may be proved under the form of a certificate to the bearer. In this case a transfer is effected by a delivery of the certificate. The property of the shares may be proved by a record in the registers of the partnership. In this case a transfer is effected by an assignment entered in the registers, and signed by the assignor or his attorney. The anonymous partnership cannot exist without the license of the king, and his approbation of the act which constitutes it. This approbation ought to be given in the prescribed form.”¹

§ 8. Before we conclude the present chapter, it may be proper to refer to the distinction, that exists between the personal liability by the common law of members of private corporations, and the members of quasi corporations.² With respect to the former, we have already shown that, by the common law, no individual responsibility attaches to the members for the corporate debts ; though the corporation may be sued for the recovery of them. A very different rule prevails with regard to the in-

¹ Code de Com. L. 1, a 29 to 37.

² As to the meaning of quasi corporations, see Introduction, p. 17, § 5.

habitants of any districts, as counties or towns, incorporated by statute, which come under the head of quasi corporations ; for against them no private action will lie, unless given by statute ; and if a power to sue them is given by statute, each inhabitant is liable to satisfy the judgment.¹

In a case which came before the Court of Errors of the state of New York, it was said by Tallmadge, President, " that *overseers of the poor* must be made liable in their official or corporate capacity, or be charged as individuals. The action must be shaped accordingly, and be supported by sufficient proof. For official neglect or misconduct they may be indicted ; but they never can be prosecuted for official liabilities, and be rendered individually responsible for the judgment, in their property and persons. This distinction between individual and official liability must be regarded ; and will regulate the form of the proceedings, and the proof necessary to sustain the action. The judgment in the one case is against them as individuals, and becomes a lien on their property ; and in the other it is against them as a corporation, and only binds their corporate property.²

¹ 2 Kent, Comm. 221 ; *Merchants Bank v. Cook*, 4 Pick. (Mass.) R. 414. Though quasi corporations are liable to information or indictment for a neglect of a public duty imposed on them by law ; yet it is settled in the case of *Russel et al. v. Inhabitants of the county of Devon*, (2 T. R. 667) that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. Per Parsons, C. J., in *Riddle v. Proprietors of Locks, &c. on Merrimack River*, 7 Mass. R. 187 ; and see also *Hawks v. Inhabitants of Kennebeck*, *ibid.* 462 ; *Mower v. Leicester*, 9 Mass. R. 247 ; *Inhabitants of Brewer v. Inhabitants of New Gloucester*, 14 Mass. R. 216 ; *Adams v. Wiscasset Bank*, 1 Greenl. (Me.) R. 361.

² *Flower v. Allen*, 5 Cowen, (N. Y.) R. 670. As to actions against Overseers of the poor, Commissioners of counties, &c., &c., see the numerous cases cited in the reporter's note to the case of *Todd v. Birdsall*, 1 Cowen, (N. Y.) R. 260.

CHAPTER XVIII.

OF THE PROCESS, PLEADINGS, AND EVIDENCE, IN SUITS, BY
AND AGAINST CORPORATIONS, AT LAW AND IN EQUITY.

WE have shown in a preceding chapter,¹ that corporations may, generally speaking, bring the same actions, both at home and abroad, for the recovery of their property, and redress of their injuries, as natural persons. Even in ejectment, they may now proceed in the ordinary way, without executing a power of attorney authorizing a third person to enter and make a lease on the land, as was formerly the practice.²

In treating of the process, pleadings, and evidence, in suits by and against corporations in the present chapter, we shall confine ourselves to the usual actions at law, and to suits in equity; as we shall devote a separate chapter to the proceedings in *mandamus*, and another to *quo warranto*.

¹ Chap. XI.

² Run. on Eject. 150; 2 Archb. Practice, 98. It was for some time, even after the introduction of the modern practice, holden necessary, that when an ejectment was brought by a corporation aggregate, that they should execute a power of attorney, authorizing some person to enter, and make a lease on the lands; that such person accordingly should enter, and make a lease under seal; and that the declaration should state the demise to be by deed. These forms, it seems, were deemed necessary, upon the principle, that a corporation aggregate cannot perform any corporate act, otherwise than under the corporate seal, nor make an attorney, or bailiff, but by deed. Corporations could not, it was therefore said, enter and demise upon the land in person, as natural persons could; nor substitute an attorney to enter into a rule for their costs; nor would an attachment go against them for disobedience to that rule. But since the principles of this action have been more clearly understood, none of these peculiarities are necessary. Adams on Eject. 193; and see Jackson, *ex dem. St. George's Church v. Nestles* 3 Johns. (N. Y.) R. 115.

§ 1. In England, and in some States of this country, the rule seems to be, that when a body corporate institutes legal proceedings, it must, at the trial, under the general issue, prove the fact of incorporation,¹ unless indeed the charter or act of incorporation be a public act, which the courts are bound to notice *ex officio*.² It is, however, generally admitted, that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation, even though the act be private.³ The proof of incorporation seems to have been held equally necessary in case of motions made by corporations, as in suits brought by them.⁴ But though in an action by a corporation, it must be prepared to show its evidence of incorporation, yet it is not so when the action is to recover lands, the legal title of which is in trustees for the use of the corporation, and the suit is in their name.⁵ In many of the States, on the other hand, the rule is well established, that if in a suit brought by a corporation the de-

¹ *Norris v. Staps*, Hob. 21; *Henriques v. Dutch West India Co.*, 2 Ld. Ray. 1535; 1 Kyd, 292, 293; *Peters v. Mills*, Buller, N. P. 107; *Jackson v. Plumb*, 8 Johns. (N. Y.) R. 378; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) R. 245; *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) R. 303; *Bill v. Fourth Western Turnp. Co.* 14 Johns. (N. Y.) R. 414; *Ernst v. Bartle*, 1 Johns. (N. Y.) Cas. 319; *Utica Bank v. Smalley*, 2 Cow. (N. Y.) R. 778; *Vernon Society v. Hills*, 6 Cow. (N. Y.) R. 25; *Wood v. Jefferson, County Bank*, 9 Cow. (N. Y.) R. 205; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) R. 540; *United States v. Stearns*, 15 Wend. (N. Y.) R. 314; *Wolf v. Goddard*, 9 Watts. (Penn.) R. 544; *Agnew v. Bank of Gettysburgh*, 2 Har. & Gill, (Md.) R. 478; *Rees v. Conocheaque Bank*, 5 Rand. (Va.) R. 326; *Hargrave & Jones v. Bank of Illinois*, 1 Breese (Ill.) R. 84, 86; *Central Manf. Co. v. Hartshorne*, 3 Conn. R. 199; *Middletown Bank v. Russ*, Ibid. 135.

² *Agnew v. Bank of Gettysburgh*, 2 Har. & Gill, (Md.) R. 478; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) R. 245; *Rees v. Conocheaque Bank*, 5 Rand. (Va.) R. 326; *Vance v. Bank of Indiana*, 1 Black. (Ind.) R. 80.

³ *United States Bank v. Haskins*, 1 Johns. (N. Y.) Cas. 132; *Utica Bank v. Smalley*, 2 Cow. (N. Y.) R. 770; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) R. 245; *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) R. 482; *Grays v. Turnp. Co.* 4 Rand. (Va.) R. 578. But see *Rees v. Conocheaque Bank*, 5 Rand. (Va.) R. 326; *Central Manuf. Co. v. Hartshorne*, 3 Conn. R. 199; 2 Virginia Cas. 297.

⁴ *Grays v. Turnpike Co.* 4 Rand. (Va.) R. 578.

⁵ *Wolf v. Goddard*, 9 Watts. (Penn.) R. 544.

defendant plead the general issue, it is an admission of the corporate existence of the plaintiffs, which dispenses with all proof on their part to that point.¹ There is no rule of pleading, it has been said, more universal, than that by pleading to the merits, the defendant admits the capacity of the plaintiff to sue; and no reason can be shown why a corporation should be placed on a different footing, in this particular, from a natural person.² In those courts, which hold, that under the general issue it is not necessary to prove the corporate existence of the plaintiffs, an exception is sometimes made in case of foreign corporations.³

Although from an old precedent,⁴ and from a note of Serjeant Williams,⁵ it appears, that the plea of *nul tiel corporation* was once a good plea in bar to an action by a corporation, yet in England and in those States of our own country, in which a corporation plaintiff is bound to prove incorporation under the general issue, upon the principles of good pleading, it would, upon the ground, that it amounts to the general issue, be bad on special demurrer.⁶ The rule holds with regard to foreign as well as domestic corporations.⁷ If such a plea be, however, answered, the replication must set forth specially how the plaintiffs are a corporation, if their incorporating act requires certain things to be done before they can become a corporation.⁸ The replication should

¹ Proprietors of Monumoi Great Beach, 1 Mass. R. 159; Christian Society in Plymouth v. Macomber, 3 Metcalf, (Mass.) R. 235; School District v. Blaisdell 6 New Hamp. R. 197; Concord v. McIntire, 6 New Hamp. R. 527; Whittington v. Farmer's Bank, 5 Har. & Johns. (Md.) R. 489; Taylor v. Bank of Illinois, 7 Monroe (Ky.) R. 584; Methodist Church v. City of Cincinnati, 5 Ham. (Ohio) R. 286; Prince v. Com. Bank of Columbus, 1 Alabama R. 241.

² Prince v. Com. Bank of Columbus, 1 Alabama R. 241.

³ Society &c. v. Young, 2 New Hamp. R. 310; School District of Blaisdell, 6 New Hamp. R. 198; Lord v. Bigelow, 8 Vermont R. 445.

⁴ Year Book 2 Edw. 4, 34.

⁵ Saund. R. 340 a. b. n. 2.

⁶ Bank of Auburn v. Weed, 19 Johns. (N. Y.) R. 300; Farmers & Mechanics Bank v. Rayner, 2 Hall, (N. Y.) R. 195; and see Kennedy v. Strong, 10 Johns. (N. Y.) R. 291; 1 Tidd, Prac. 599, 560; 1 Chitty Pleading, 467, 497.

⁷ Farmers & Mechanics Bank v. Rayner, 2 Hall, (N. Y.) R. 195.

⁸ Bank of Auburn v. Aikin, 18 Johns. (N. Y.) R. 137.

conclude with a verification, so that the defendant may rejoin, either by taking issue on the replication, or setting up ouster, or the dissolution of the corporation, if such be the fact ; and if it conclude to the country it is bad on special demurrer.¹

In those States, on the other hand, where, under the general issue, a corporation plaintiff is not bound to prove their incorporation, the plea is good ;² and in such States, if special pleading be dispensed with by statute, and notices of grounds of defence substituted, the defendant, if he would avail himself of an objection to the corporate existence or character of the plaintiff, must give notice of his objection, or he cannot avail himself of it.³

A corporation in proving its existence under the general issue, in courts in which it is under that issue bound to prove it, is confined to its name as it appears upon the record. But though a corporation is designated by a name, with which the description in the charter does not exactly correspond, if it appear that there are persons in *rerum natura* substantially answering the appellation, the declaration will be good. In an action of ejectment, the demise was laid to be by the mayor, burgesses, &c. of the *borough* town of M. On the trial, it appeared by the charter, that the corporate name was the "mayor, &c. of M." The question raised was, whether the court would, by implication, make out that these names were the same. The exact nature of the variance will be seen from the observations of the court. They said, as to the distinction endeavored to be taken between *Maldon* and *Malden*, it is sufficient to say, that the two words sound alike, and therefore, that the variance is of no importance. As to the other, viz. the insertion of the words "of the borough town," the distinction is laid down in Bacon's Abridgment, (tit. corporations, c. 2,) and Bro. Abr. (Misnomer 73, quoted in 1 B. and P. 44,) that if there be enough said to show that there is such a corporation, and to distinguish it from all others, the body politic is well named, though the words and syllables are varied

¹ *Onondaga County Bank v. Carr*, 17 Wend. (N. Y.) R. 443.

² *Proprietors of Monumoi Great Beach v. Rogers*, 1 Mass. R. 159.

³ *Christian Society in Plymouth v. Macomber*, 3 Metcalf, (Mass.) R. 235.

from. Now here, from the words mayor, &c. of Malden, it must be implied that Malden is a borough; for, otherwise there would not be burgesses. Then if it be a borough, it must also be a town. The words, borough town of Malden, are therefore synonymous with Malden; and then there is no substantial variance.¹ In such case indeed, the mere misnomer varying in words and syllables, and not in substance, cannot be taken advantage of under the general issue, or as ground of nonsuit, but must be pleaded in abatement, even in those States in which it is necessary for a corporation plaintiff, to prove under the general issue, its corporate existence.²

In a suit, however, against "the President and Trustees of the Savings Bank in the County of Strafford," to recover payment for serving a writ of execution for them, a copy of a writ and execution in the name of "the Savings Bank for the County of Strafford" was held to be inadmissible in evidence.³

§ 2. Where the charter is a public act, which courts are bound to notice *ex officio*, it is not necessary to give it in evidence to prove incorporation;⁴ and the act incorporating the bank of the United States is not considered in New York a public act, so as to dispense with such proof.⁵ The existence of a corporation, incorporated by private act, may be proved either

¹ Doe d. Mayor, &c. of Malden v. Miller, 1 Barn. & A. 699. But in debt, for use and occupation, under a dean and chapter, a declaration which alleged the occupation to have been by the permission, &c. of "the dean and chapter," and the occupancy was proved to have been under a letting of a former dean, was holden bad. Dean and Chapter of Rochester v. Pierce, 1 Camp. 466.

² Bank of Utica v. Smalley, 2 Cow. (N. Y.) R. 778, Savage, C. J. dissenting; Burnham v. President and Trustees, &c., 5 New Hamp. R. 449; 7 Ibid. 309; Medway Cotton Manufactory v. Adams, 10 Mass. R. 362.

³ Burnham v. President and Trustees, &c. 5 New Hamp. R. 446; but see Minot v. Curtis, 7 Mass. R. 444; 1 Monroe, (Ky.) R. 171.

⁴ Agnew v. Bank of Gettysburgh, 2 Har. & Gill, (Md.) R. 478; Dutchess Cotton Manufactory, v. Davis, 14 Johns. (N. Y.) R. 245; Rees v. Conocheaque Bank, 5 Rand. (Va.) R. 326; Vance v. Bank of Indiana, 1 Blackf. (Ind.) R. 80.

⁵ United States Bank v. Stearns, 15 Wend. (N. Y.) R. 314.

by an exemplified copy of the act, authenticated by affixing thereto the seal of the State, without other proof,¹ by a sworn copy of the same or by admission,² all such proof being accompanied by proof of acts of *user* under the act or charter ; such as, that shortly after the passage of the act, the company had an office or place of business, where the business, to carry on which they were incorporated, was carried on, and that the affairs of the company had been managed by directors from time to time chosen ;³ and the acts and admissions of a party, as the acting as the president of the corporation, and giving a note to it in its corporate name, is *prima facie* evidence of *user*.⁴ Where the corporation was a domestic corporation, the printed statute book, as printed by the printer of the State, has been admitted as evidence of the act of incorporation ;⁵ but in case of a turnpike company, the appointment of inspectors by the governor, and the certificate of the inspectors that the road was completed, and that the gates were erected, are not sufficient evidence of the existence of the corporation.⁶ The evidence of *user* seems to be necessary to accompany the evidence of the act of incorporation, only when something is required by the act to be done *in futuro*, to entitle it to corporate powers ; but not where the corporation is declared to be such by statute, and nothing is required to be performed to

¹ Ibid. *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) R. 194 ; *Utica Insurance Company v. Tillman*, 1 Wend. (N. Y.) R. 555 ; *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) R. 478 ; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) R. 540 ; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) R. 296 ; *State v. Carr*, 5 New Hamp. R. 367 ; *United States v. Johns*, 4 Dallas, R. 416 ; *Searsburgh Turnp. Co. v. Cutler*, 6 Vermont R. 315 ; *United States v. Johns*, 1 Wash. C. C. R. 363.

² *Gospel Society v. Young*, 2 New Hamp. R. 310.

³ *Utica Ins. Co. v. Tillman*, 1 Wend. (N. Y.) R. 556 ; *United States Bank v. Stearns*, 15 Wend. (N. Y.) R. 314.

⁴ *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) R. 478 ; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) R. 540 ; *Searsburgh Turnp. Co. v. Cutler*, 6 Vermont R. 315 ; *State v. Carr*, 5 New Hamp. R. 367.

⁵ *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) R. 205, 206, and the case of *Chenango Bank v. Noyes*, there cited.

⁶ *Bill v. Fourth Western Turnp. Co.* 14 Johns. (N. Y.) R. 416.

give effect to the act incorporating it.¹ To prove the acts of a corporation, necessary to be done in order to their corporate existence, the books of the corporation, proved by the clerk or secretary, are competent evidence. It would be a very dangerous doctrine to the numerous corporations every day created, that at any distant day, at which a controversy might arise with them, they should be obliged to produce the advertisement calling the meeting which organized them.² If charter commissioners are directed to ascertain the performance of a condition precedent to incorporation, and they declare it, though falsely, to have been performed, it shall be deemed true until the sovereign power interposes. A wrongdoer, sued by the corporation, cannot show the falsity of such declaration, for the purpose of defeating the suit of the corporation.³ And indeed when a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of its legal existence.⁴ Where a cognizance,⁵ mortgage,⁶ note,⁷ or other instrument is given to a corporation, as such, the party giving it is thereby estopped from denying the corporate existence of the corporation, and no further proof thereof is necessary until such proof is rebutted.⁸ The mere indorsement of a bill of exchange to a bank

¹ *Fire Department v. Kip*, 10 Wend. (N. Y.) R. 269.

² *Grays v. Turnp. Co.* 4 Rand. (Va.) R. 578; *King v. Mothersell*, 1 Stra. 93; 12 Vin. Abr. Tit. Evid. 90, pl. 16; 2 Camp. N. P. R. 101; *Turnp. Co. v. M'Kean*, 10 Johns. (N. Y.) R. 156; *Owings v. Speed*, 5 Wheat. R. 424; *Hagerstown Turnp. Road Co. v. Creeger*, 5 Har. & Johns. (Md.) R. 122; *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) R. 478, authorities cited by the counsel.

³ *Tar River Nav. Co. v. Neal*, 3 Hawks, (N. C.) R. 520, and see *Ham-tranck v. Bank of Edwardsville*, 2 Missouri R. 169; *Hughes v. Bank of Somerset*, 5 Litt. (Ky.) R. 47; *Searsburgh Turnp. Co. v. Cutler*, 6 Vermont R. 315; and see post, Ch. XXI. § 8.

⁴ *Hagerstown Turnp. Road Co. v. Creeger*, 5 Har. & Johns. (Md.) R. 122.

⁵ *Hénriques v. Dutch West India Co.* 2 Ld. Raymd. 1535.

⁶ *Den v. Van Hauten*, 5 Halst. (N. J.) R. 270.

⁷ *Congregational Society v. Perry*, 6 New Hamp. R. 164; *All Saints Church v. Lovett*, 1 Hall, (N. Y.) R. 191; *John v. Farmers and Mechanics Bank*, 2 Blackf. (Ind.) R. 367.

⁸ *Dutchess Cotton Manuf. Co. v. Davis*, 14 Johns. (N. Y.) R. 245, *Thomp-*

does not, however, in Illinois admit that the bank is a corporation ;¹ and in New York, by the course of recent decisions, it would seem that the mere fact, that, in a contract with a joint stock company, a party has designated it, by a name which is appropriate to a corporate body, does not dispense with proof of incorporation, unless it be distinctly stated in the contract, that the company is an incorporated company.² A judgment in favor of such company will, however, estop the defendant from denying its corporate existence, in an action on such judgment, or in a suit on the recognizance of bail, either in the original action or in error.³

It cannot be shown in defence to the suit of a corporation, that the plaintiff's charter was obtained by fraud ;⁴ nor especially by a subscriber who accepted the charter, and assisted in putting it into operation.⁵ Neither can it be shown in defence, that the plaintiffs have forfeited their corporate rights by misuser or non user. Advantage can be taken of such forfeiture only on process on behalf of the State, instituted directly against the corporation for the purpose of avoiding the charter or act of incorporation ; and individuals cannot avail themselves of it in collateral suits, until it be judicially declared.⁶ And where a company was incor-

son, C. J. ; *Hamtranck v. Bank of Edwardsville*, 2 Missouri R. 169 ; *Hughes v. Bank of Somerset*, 5 Litt. (Ky.) R. 47 ; *Searsburgh Turnp. Co. v. Cutler*, 6 Vermont R. 315 ; *Tar River Nav. Co. v. Neal*, 3 Hawks, (N. C.) R. 520.

¹ *Hargrave & Jones v. Bank of Illinois*, 1 Breese, (Ill.) R. 84, 86.

² *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) R. 540 ; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) R. 480 ; denying the dictum of *Thompson in Dutchess Cotton Manuf. Co. v. Davis*, 14 Johns. (N. Y.) R. 245 ; and see *United States v. Stearns*, 15 Wend. (N. Y.) R. 316.

³ *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) R. 540.

⁴ *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) R. 371 ; *All Saints Church v. Lovett*, 1 Hall, (N. Y.) R. 198 ; *Bear Camp. River Co. v. Woodman*, 2 Greenl. (Me.) R. 404.

⁵ *Centre &c. Turnp. Road Co. v. McConaby*, 16 Serg. & Rawle, (Penn.) R. 140.

⁶ *Vernon Society v. Hills*, 6 Cowen, (N. Y.) R. 23 ; *All Saints Church v. Lovett*, 1 Hall, (N. Y.) R. 198 ; *McConaby v. Centre & Kishocaquillas Turnp. Road Co.*, 16 Serg. & Rawle, (Penn.) R. 140 ; *S. C. 1 Penn. R. 426* ; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, (Penn.) R. 9 ; *Chester Glass Co. v.*

porated for the purpose of removing from a river all obstructions to the free passage of logs, &c., and were authorized to demand tolls of the owners of logs, &c., freely passing down the river, in an action to recover tolls for logs, that passed the river freely, it was held, that the defendant could not show, that the corporation had not removed the obstructions, even though the act of incorporation was to be void if they should not be removed within a year, and more than a year had elapsed before the action was brought.¹

§ 3. In proceeding against a corporation, says Mr. Tidd, the process should be served on the mayor, or other head officer; and if the defendants do not appear before or on the *quarto die post* at the return of the original, by an attorney appointed under their common seal, (for they cannot appear in person,) the next process is a *distringas*, which should go against them in their public capacity; and under this process the sheriff may distrain the lands and goods, which constitute the common stock of the corporation. If they have neither lands nor goods, there is no way to compel them to appear, at law or in equity, but only in parliament; for it is a rule, that for a public concern, the sheriff cannot distrain any private person, who is a member of the corporation.²

Dewey, 16 Mass. R. 102; State of Vermont v. Society, &c., Paine, C. C. R. 652; Bear Camp River Co. v. Woodman, 2 Greenl. (Me.) R. 404; Day v. Stetson, 8 Greenl. (Me.) R. 372; State v. Carr, 5 New Hamp. R. 367; John v. Farmers & Mechanics Bank of Indiana, 2 Black. (Ind.) R. 367; Canal Co. v. Rail Road Co., 4 Gill & Johns. (Md.) R. 121; Webb v. Moler, 8 Ham. (Ohio.) R. 552; Buncombe Turnp. Co. v. McCarson, 1 Dev. & Bat. (N. C.) R. 306; Tar River Nav. Co. v. Neal, 3 Hawks, (N. C.) 520; Hughes v. Bank of Somerset, 5 Litt. (Ky.) R. 47; Searesburgh Turnp. Co. v. Cutler, 6 Vermont R. 315; Hamtranck v. Bank of Edwardville, 2 Missouri, R. 169, and see Post, Ch. XXI.

¹ Bear Camp River Co. v. Woodman, 2 Greenl. (Me.) R. 404.

² 1 Tidd's Practice, 116. The process against a corporation, must be served on its head, or principal officer, per Spencer, J. in M'Quin v. Middletown Man. Co., 16 Johns. (N. Y.) R. 6. And see Chap. XI. § 12; and Ch. XVII; and Wood v. Dummer, 3 Mason, C. C. R. 308. Proceedings against aggregate corporations must be by original summons, and *distringas*, 2 Archb. Practice, 98. In England by 2 Will. 4, Ch. 39, every writ of summons against a corporation aggregate may be served on the mayor, or other head officer, or, on the town secretary of such corporation. Har. Dig. Ad-

Serving a summons on any private individual of a corporation is not sufficient notice to hold the corporation to trial ; and the individual summoned may plead the want of notice to the corporation.¹ Members of a corporation aggregate, not being liable to a *capias*, cannot be holden to bail for anything done by them in their corporate capacity.² No precedent of an original writ against a corporation has been known. In all the elementary writers, and in all books of practice, which treat of the proceedings against corporations, it is laid down as the universal rule, that the process must be by summons, and not by attachment.³ In 1816, several suits were brought against certain banks in New York, on notes issued by those banks, which they had refused to pay in gold or silver, that had been demanded of them ; the banks generally having suspended their payments in *specie*. The suits were commenced by original writs. The Court held, that the original writ in *assumpsit*, against a corporation, must be in the nature of a *summons*, and not by *pone*, or *attachment*.⁴

§ 4. In an action brought by the Merchants Bank, in Massachusetts, the writ was served by a deputy sheriff who was a member of the corporation ; and the court held, that he was not a party to the writ within the meaning of St. 1783, ch. 43. The court observed, that it was true, a sheriff or his deputy in serving process by or against corporations of which he is a member, has an opportunity to commit frauds in his own favor, which it may

denda, 2402. A corporation may be sued in their corporate capacity, and need not be named individually ; but in a suit against the trustees of a town they must be severally named. *Trustees of Lexington v. M'Connell*, 3 Marsh. (Ky.) R. 224.

¹ *Rand v. Proprietors of Locks on Connecticut River*, 3 Day, (Conn.) R. 441.

² Bro. Corpor. pl. 43 ; and see ante Chap. XVII, § 1. Proceedings against aggregate corporations are very much the same as against peers of the realm. 2 Archb. Practice, 98 ; 1 Tidd's Practice, 115.

³ Per Curiam, in *Lynch v. Mechanics Bank*, 13 Johns. (N. Y.) R. 137 ; and see also 1 Kyd, 271 ; 2 Impey, C. B. Pr. 675, n. ; 6 Mod. 183 ; Com. Dig. Plead. (2 B. 2) ; 1 Bac. Abr. 507 ; Tit. Corp. 2 Sellon, 148.

⁴ *Lynch v. Mechanics Bank*, 13 Johns. (N. Y.) R. 137 ; *Contra*, Styles, 367, cited in Cowp. R. 85.

be difficult to guard against or detect ; but that the sheriff was an officer in whom great confidence is necessarily reposed. It was well deserving of attention, the court remarked, whether a slight pecuniary interest is a greater cause for taking from him the power of serving a writ, than his standing in the relation of father, or son, or expectant heir, or devisee, would be, and yet neither of these relations prevented his serving process.¹ In a case in Maine, the writ was served by a deputy sheriff who was a stockholder in the Wiscasset Bank, and this was pleaded in abatement, on the ground that he was a party to the suit ; but the plea was overruled.²

§ 5. As a corporation must take and grant by its corporate name,³ so by that name it must sue and be sued.⁴ It has not been deemed necessary, however, to repeat the full name of the corporation at every recurrence in the declaration ; reference in a clear manner to the name already given, being sufficient. Thus, it was held in New Jersey, that where the name of the corporation is correctly stated at the commencement of the declaration, as “ The trustees of the A. B. C., of &c., and in the subsequent part of the declaration it is alleged, that ‘ being indebted, they the said trustees undertook and promised,’ ” it is a sufficient allegation that the promise was made by the corporation, and not by the trustees individually.⁵

¹ Merchants Bank v. Cook, 4 Pick. (Mass.) R. 405.

² Adams v. Wiscasset Bank, 1 Greenl. (Me.) R. 361.

³ Ante, Chap. III, § 4.

⁴ 1 Kyd, 253 ; Berks & Dauphin Turn. Road v. Myers, 6 Serg. & Rawle, (Penn.) R. 17 ; Porter v. Nekervis, 5 Rand. (Va.) R. 359 ; Minot v. Curtis, 7 Mass. R. 444 ; First Parish in Sutton v. Cole, 3 Pick. (Mass.) R. 236 ; 2 Salk. 451. A mayor of a corporation cannot sue on a contract made by him on behalf of the corporation. Bowen v. Morris, 2 Taunt. 374. A corporation may sue in their name of creation, though express power be given to them to sue by another name. College of Physicians v. Talbois, 1 Ld. Raym. 153.

⁵ Trustees of Antipædo Baptist Society v. Mulford, 3 Halst. (N. J.) R. 182. The case of Woolwych v. Forrest et al., 1 Penn. R. 115, cited at the bar, the court considered did not bear upon the question before them. That case proves, that in a suit by or against a corporation, it should be correctly

If a corporation changes its name, it must sue by its new name, in its old constitution. This was decided in debt on a bond given about thirty years before to a corporation, that was said to be "dissolved by being rendered incapable of exercising any of its functions" most of that time, and that it received a new charter in 1763, and a new name. The bond was given to a corporation named "mayor, aldermen, and commonalty;" for many years before 1763, no mayor or alderman had been elected. The bond was declared on as made to the new corporation.¹ The mere change of the name of the corporation by the legislature does not, however, abate, nor can it under any circumstances be used for the purpose of abating, a suit brought by the corporation in its old name before the change was made.²

It is said, that if a corporation be *known* by a name, it is sufficient to sue them by that name :³ but this seems to be confined to the case of a corporation by *prescription* ; for it is said on another occasion,⁴ that when a corporation is created by the king, and the commencement of it appears by record, it can have no other name by use, nor be named otherwise than as the king by his letters patent has appointed, and the court will not permit it to be sued by any other name. Mr. Kyd, in adverting to these authorities, says, he is unable to perceive any reason why, in the case of a corporation by charter, which has acquired by long

named; and that if there be a variance between the real name and the name given in an obligation or other instrument, on which the suit is founded, the declaration should contain proper averments of identity; but it did not prove, that if in the writ and in the commencement of the declaration the proper corporate name is used, the same full name must throughout be repeated. And see *Mayor & Burgesses of Lynne Regis*, 10 Co. 120; *London v. Lynn*, Hen. Bl. 260; *Mayor, &c. of Stafford v. Bolton*, 1 Bos. & P. 40. In these cases the full name of the corporation was not on every occasion repeated. See also *Precedents* in 1 *Wentworth*, 181; 5 *Ibid.* 163, 176, 182, 201, 255.

¹ *Mayor and Commonalty of Colchester*, 3 Burr. 1866, and 5 Dane, Abr. 151; and see *Mayor of Scarborough v. Butler*, 3 Lev. 237.

² *Thomas v. Visitors, &c.*, 7 Gill & Johns. (Md.) R. 369.

³ Bro. Corpor. 40; 8 Ass. pl. 24.

⁴ 1 Anders. 223.

usage a name of reputation different from its real name of foundation, it may not be sued by that name of reputation, as well as a man may be sued by a name of reputation different from his name of baptism, or why, if the corporation plead a misnomer, the plaintiff may not reply, that it is known by the one name as well as by the other.¹ In the case of *Minot v. Curtis* it was intimated by the court, that a corporation may be known by several names. But the observation was applied to a parish, which may be by prescription.²

A declaration in the corporate name, it has been adjudged, is good, without mentioning the name of the head of the corporation.³ It is in fact said to be more safe to omit the name of the head, for if his name be mentioned, and he die pending the action, it will abate.⁴ And the trustees of a college, being incorporated, should sue by their corporate title, and need not set out their individual names.⁵ The trustees of a town in Kentucky must when sued be individually named.⁶

Where a corporation is designated by a name, with which the description in the charter does not exactly correspond, but, it appears that there are persons in *rerum natura*, substantially answering the appellation, the declaration is holden good.⁷ The rule is well settled, that if the name given sufficiently designates the corporation, the contract, whether sealed or not, cannot be avoided for the misnomer; and that the proper mode of suing upon it is, to declare in the true name of the corporation, and allege, that the bond or other instrument was made to the corporation under the name therein given to it.⁸

¹ 1 Kyd. 254; and see ante, Chap. III, § 4.

² *Minot v. Curtis*, 7 Mass. R. 444.

³ *Newton v. Travers*, 3 Salk. 103; *S. P. Rex. v. Rippon*, 1 Com. 86; *S. C.* 2 Salk. 433. Formerly the point was somewhat doubted. 1 Kyd, 281.

⁴ 6 Petersdorf's (Abr. Am. Ed.) 446, (note); and see 1 Kyd, 291.

⁵ *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) R. 324.

⁶ *Trustees of Lexington v. McConnell's Heirs*, 3 Marsh. (Ky.) R. 224.

⁷ *Mayor, &c. of Malden v. Miller*, 1 B. & Ald. 699.

⁸ *African Society v. Varick*, 13 Johns. (N. Y.) R. 38; *Middletown v. McCormick*, 2 Pen. (N. J.) R. 500; 1 *Ibid.* 115; *Inh. of Alloways Creek v.*

A declaration upon a promissory note to the Medway Cotton Manufactory, by the name of R. M. and Co., was holden good upon demurrer in Massachusetts. The declaration charged the defendants upon a note made by them ; with an averment, that it was made to the corporation, by the name of R. M. and Co. The court said ; “ Upon the *demurrer*, we have only to determine, whether the declaration is in itself absurd and repugnant, and incapable of proof. We think it is not, upon the authorities respecting *misnomers* of corporation, or upon the reason of the thing.”¹ In debt on bond to the *committee* or *trustees* of a corporation, *solvendum* to the corporation by its true name, the corporation may declare in their own name, and may allege, that the bond was made to them by the description of the *committee*, &c.² Mr. Kyd lays it down, that where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and in their declaration aver, that the defendant made the deed to them by the name mentioned in the deed ;³ or, if the plaintiffs in the declaration take no notice of the variance, and the defendant trusts to the advantage he may have of it at the trial ; then if a special verdict be found, “ that the defendant made and sealed the writing in question, and delivered it to the corporation (describing them by their true name) by the name mentioned in the deed, this will entitle the plaintiff to judgment.”⁴

So, if a deed be made *by* a corporation, by a name different from the true name, the plaintiff may sue them by their true name, and aver, that “ by the name mentioned in the deed,” they made

String, 5 Halst. (N. J.) R. 323 ; Medway Cotton Manuf. Co. v. Adams, 10 Mass. R. 360 ; Berks & Dauphin Turnp. Co. v. Myers, 6 Serg. & Rawle, (Penn.) R. 16 ; Hagerstown Turnpike v. Creeger, 5 Har. & Johns. (Md.) R. 122 ; see ante, Chap. III. § 4, Chap. VIII. § 6.

¹ Medway Cotton Man. Co. v. Adams et al. 10 Mass. R. 360 ; and see Dyer, 279 ; Dance v. Girdler, 1 Bos. & Pul. (N. R.) 40 ; 1 Chitty, Pl. 252.

² New York African Society v. Varick et al.

³ 1 Kyd, 287, who cites 10 Co. 125, b.

⁴ Ibid.

such a deed to him; or if he take no notice of the variance in his declaration, he may have the same advantage from a special verdict as the corporation may have when they are plaintiffs.¹ Mr. Kyd feels no hesitation in saying, that in *all* cases, where, by express averment, or by the finding of the jury, it is made apparent, that the corporation *sued* is the same, that made the deed, whether the name in the deed be the same in *effect* or not with the name of incorporation, or whether the difference between them be *seeming* or *real*, that judgment *ought* to be given in favor of the deed.²

If a corporation sue or be sued by a wrong name, to take advantage of the misnomer, it should be pleaded in abatement, and not in bar.³ In a suit by a corporation it was objected, that the charter given in evidence varied the name of the plaintiff so much from the declaration, as to form good ground of nonsuit, and the plaintiffs were nonsuited; but on a rule to set it aside, the court said, the objection taken would operate in bar, if the plaintiff had declared so that they could not be identified with the persons entitled to the tolls claimed; but the objection taken only abates the suit, being a mere formal variance; the plaintiffs were therefore improperly nonsuited.⁴ A corporation defendant cannot take advantage of a misnomer in arrest of judgment, but must plead it in abatement.⁵ And where a bank issued notes by a wrong

¹ Ibid. 288.

² Ibid.

³ 26 H. 8, 1 b.; 1 Kyd, 283. It was once doubted if a mistake of the *plaintiff's* christian name or surname were not ground of non-suit; but it is now settled, that the mistake must be pleaded in abatement, even in the case of a corporation. 1 Chitty, Pl. 440; Bank of Utica v. Smalley, 2 Cowen, (N. Y.) R. 778; Medway Cotton Man. Co. v. Adams, 10 Mass. R. 360. To make the mistake of the name of a corporation pleadable in bar, it should appear, that there is no such corporation. Debts due to a corporation in N. Carolina must be sued for in the name of the body corporate, and cannot be recovered in the name of A. B., President &c., and Directors of such Company; Britain v. Newman, 2 Dev. & Bat. (N. C.) R. 363.

⁴ Mayor, &c. of Stafford v. Bolton, 1 Bos. & Pul. 40.

⁵ Gilbert and another v. Nantucket Bank, 5 Mass. R. 97. It is said where a mayor and commonalty, or other corporation aggregate, are sued by a

corporate name, and was sued on its notes by such name, the plaintiff was permitted to amend without costs, as he was led into the mistake by the fault of the defendants.¹

The plaintiff brought an action by the name of "The Proprietors of a Bridge over Connecticut River, between Montague and Greenfield, late in the county of Hampshire, and now in the county of Franklin." On motion to the Court, the plaintiff was permitted to amend his writ by altering the name of the defendants to that of "The Proprietors of Connecticut River Bridge." The defendants objecting to the said amendment, the question was reserved for the consideration of the Court. The court said, "that, the first corporation was dead, and the new one was created for the same purpose and object. The writ was served on the clerk of the existing corporation, by which regular notice was given to the real proprietors of the bridge. This is then the common case of a *misnomer*. The amendment may be made, on the common rule of an election by the defendants of the costs of the action to this time, or a continuance."² A note given to A. B. as Trustees of a corporation must be sued in their name as trustees, and not in the name of the corporation, for they have the legal interest in the

wrong name, they may make an attorney by special warrant, by their true corporate name, who may plead the *misnomer*. 22 Ed. 4, 13 b. Bro. Corpor. 65. But this it seems must be by special application to the court. 1 Ld. Raym. 118. Mr. Kyd says, "it is true, indeed, that in most of the cases where the question of *misnomer* of a corporation has been agitated, it has arisen on special verdict;" but he apprehends, "that where a corporation have taken no advantage of a variance from their name, either by plea or at the trial, they cannot arrest the judgment, or reverse it on that account." 1 Kyd, 285. If, however, there be a variance in the name apparent in the entry of the judgment, that *may* be error; a judgment in the common pleas was thus, "that the mayor and commonalty and citizens of London should recover the debt for which they sued, and £6 costs to the same *mayor* and *commonalty* adjudged, and it was held, that this was error, there being no such corporation as the mayor and commonalty, without citizens; but it appearing on the docket roll, that it was well entered, it was awarded by the Common Pleas to be amended. Cro. Car. 574.

¹ Bullard v. Nantucket Bank 5 Mass. R. 99.

² Sherman v. Proprietors of Connecticut River Bridge, 11 Mass. R. 338.

note ; but contracts made with the mere servants and agents of the corporation must be sued in the name of the corporation.¹

§ 6. By the Civil Law a member could not be a witness in a cause where a corporation is a party, if the particular members may have any advantage. But if the profit redounds to the community in general, a member of the body may be admitted a witness.²

In a late case in the Court of Chancery in the State of New York, Chancellor Walworth said, that he believed it was now the practice of all the courts to admit corporators to testify in behalf of the corporation, where they have no personal interest in the controversy ; and against the corporation, where the witness does not object ; but that corporators were excluded from testifying where they have a direct personal interest in favor of the party calling them, in virtue of the corporation or otherwise.³

Upon the general principles of evidence of the common law, a member of a corporation cannot be a witness in their behalf ; as he must in most cases have an interest in the event of the suit. This, as a general rule of law, is so well established, that it is necessary merely to refer to it before we proceed to treat of the exceptions to which it is subject.⁴

Where the members of the body corporate derive no private

¹ *Binney v. Plumley*, 5 Vermont R. 500.

² *Wood's Civil Law*, 308.

³ In the matter of *Kip*, 1 Paige's (N. Y.) Ch. R. 613. The Chancellor cited *Hartford Bank v. Hart*, 3 Day, (Conn.) R. 491 ; *Magill v. Kuffman*, 4 S. & Rawle, (Penn.) R. 317.

⁴ A person, who has acted in breach of an alleged corporate custom, is not a competent witness to disprove the existence of the custom. The witness is clearly interested. If the company had failed in establishing the custom, he would have been discharged from actions to which he was liable for the breach of it. *Company of Carpenters v. Hayward*, 1 Doug. 373. A stockholder cannot be a witness for the corporation in Louisiana. *Lynch v. Postlethwaite*, 7 Martin, (La.) R. 69. An inhabitant of a place is incompetent to prove a common right of fishery in all the inhabitants. *Jacobson v. Fountain*, 2 Johns. (N. Y.) R. 179 ; *Lufkin v. Haskell*, 3 Pick. (Mass.) R. 357.

advantage, there can be no pretence for excluding their testimony.¹ Hence, the trustees of a charitable foundation are admissible as witnesses.² And a person, who has only one of two qualifications, may be called as a witness to prove, that certain privileges belong to such persons as have both.³

¹ On a quo warranto for taking 1*s*. 2*d*. per chaldron for all sea coals brought to London, the defendant prescribed for the duty; to which several citizens, freemen of London, were called. It was objected, that they ought to be rejected *quia in proprio casu. Sed per Cur.* It appears, that the mayor and sheriffs have the whole benefit of this toll, though they have it for the benefit of the whole corporation; yet these witnesses, having no particular profit to themselves, may be admitted; for it cannot be presumed, that an advantage so small and remote would influence them. *Rex v. Mayor of London*, 2 Lev. 231; S. C. Show. 146; 1 Vent. 351; and see *Society &c. v. Perry*, 6 N. Hamp. R. 144.

² In an action of assumpsit for work and labor, many of the governors of the hospitals were called as witnesses for the defendants. Their competency was objected to, as they were defendants on record; but Lord Kenyon admitted their testimony, distinguishing the case of the trustees of a charity, under which they took no beneficial interest, and that of a political corporation, in defence of the property of which each member is individually interested; *Weller v. Governors of Foundling Hospital*, Peake, N. P. C. 206.

³ On a *mandamus* to the defendants, commanding them to restore the plaintiff to the office of common councilman of the borough of A., they returned, that the plaintiff was not elected to the office, as in the writ supposed. After the plaintiff had proved the fact of his election, the defendant's counsel insisted that, by the constitution of the borough, no person was capable of being elected a common councilman, who did not hold a burgage tenure, and also inhabit within the borough; but the plaintiff inhabited in no part of it. To prove the constitution, the witness offered was one R. W. But it being objected by the plaintiff that he had a burgage tenure and also inhabited in the borough, and could not be a witness to prove a right in himself, and in such as had his qualifications, exclusive of all others; which fact being admitted, he was refused by the court to be admitted to prove this constitution. But then one J. was produced as a witness for the defendants to prove it, who was an inhabitant of the borough; but it was admitted, that he had no burgage tenure. Whereon he was allowed by the court to be a good witness, as to the right fixing in such as held burgage, and also were inhabitants, since he did not attempt to establish the right in the inhabitants only. *Stevenson v. Nevinson*, 2 Ld. Raym. 1353; S. C. 2 Strange, 583.

In a late and important case in Maryland, it was made a question among many others, whether one Payson, a stockholder in the Union Bank of Georgetown, could be admitted to prove himself to have been the depositary of the muniments of the corporation. Buchanan, C. J., who gave the opinion of the court, said that though an interested corporator cannot be received to testify generally for the corporation, yet it did not therefore follow, that he is competent for no purpose; but that he might be placed in a situation to render him a necessary and competent witness for some purposes. He instanced the case of the *King v. Inhabitants of Netherthong*,¹ as an appropriate example, where a rated inhabitant of that township, whose interest was admitted, was called by the respondents, and was held to be competent to give evidence as to the custody of a certificate from the township of Honley, (which was produced,) acknowledging the pauper's father and grandfather to belong to Honley, in accordance with a decision in another case, that was mentioned by Lord Ellenborough.² "Payson being a stockholder in the bank," the Judge proceeded to observe, "was not a competent witness for the plaintiffs for all purposes; but he was offered to prove, among other things, that he was the president of the bank from the 27th of April, 1812, until after the 27th of May, 1819; that as such, he was the depositary of the bank; and that during the time he was president, a certain book called the by-laws was one of the books of the bank. And if an interested corporator is competent to give evidence in behalf of the corporation, as a depositary of the muniments, in relation to his custody, of a paper produced as one of the muniments, why was not Payson within the exception to the general rule, and competent to prove himself the depositary of the book called the by-laws, as a muniment of the bank? The only argument urged against his compe-

¹ 2 Maule & Sel. 337.

² In New York, an inhabitant of a town, who pays taxes to support the poor, is a competent witness in a suit brought by the overseers of that town against the overseers of another town, relative to the settlement of a pauper. *Bloodgood v. Overseers of Jamaica*, 12 Johns. (N. Y.) R. 285; *S. P. Falls v. Belknap*, 1 Johns. (N. Y.) R. 386.

tency, as being within the exception is, that at the time he was called as a witness, he appears from the plaintiff's own offering to have ceased to be the depositary. But that, it is conceived, makes no difference, and that he was a competent witness to identify the book as a muniment of the bank, during the time that he was the depositary ; Higginbotham, too, then acting as the cashier, and being a witness for that purpose, ought not to have been rejected as incompetent to prove any of the matters for which he was offered. He was not competent to prove, that it continued to be one of the books of the bank, after he had ceased to be the depositary, and when he stood only in the relation of a stockholder in the bank, any more than any other stockholder. But admitting the existence, as to depositaries, of the exception to the general rule of evidence, no reason is perceived, why his having ceased to be the depositary at the time he was called as a witness, disqualified him from proving the book produced to have been a muniment of the bank, while he was the depositary ; the nature of his interest as a stockholder not being changed, but remaining the same as it was, while he continued to be the depositary."¹

In the case of the *United States v. Johns*, in the Circuit Court of the United States, before Washington, J., the president of an incorporated insurance company, by whom property was assured, although a stockholder, was admitted a witness to prove the handwriting of the defendant, to the manifest of the cargo ; because the conviction of the defendant would not be evidence in a suit on a policy against the company.²

Upon a question, in the English Court of Chancery, whether a bond belonged to plaintiff or defendant, it was objected, that all the plaintiff's witnesses were members of the corporation, and the objection was allowed. The Lord Keeper said, every corporation ought to have a town clerk, and other clerks, not freemen, that they may be competent witnesses, if necessary. But the defendant having in this case cross-examined some of the plaintiff's witnesses, the Lord Keeper said, that a cross-examina-

¹ *Union Bank of Maryland v. Ridgeley*, 1 Har. & Gill, (Md.) R. 408, 409.

² *United States v. Johns*, 1 Wash. C. C. R. 363.

tion of a witness on one side, in any matter tending to the merits, makes him a competent witness on the other, though otherwise liable to exception.¹

In the matter of *Kip* in the Court of Chancery of New York, it appeared, that the testimony of *Kip* was material in the prosecution of suits against the Reformed Protestant Dutch Church, and his examination was applied for before the master, pursuant to the provisions of the act to perpetuate the testimony of witnesses. The master made an order for the examination of *Kip*, who appeared before the master, but declined testifying, on the ground that he was the treasurer, and one of the corporators of the Dutch Church; and that he was also a pew-holder in two churches which were on lands, the title whereof depended upon the same questions which arose in the case. The master decided that *Kip* was bound to testify, notwithstanding his objection; and on his refusal to be sworn, the master issued warrants for his commitment, in pursuance of the provisions of the act. It was decided by Chancellor Walworth, that the witness was not so far a party, as to excuse him from testifying.² The only case, within the recollection of the Chancellor precisely in point, was a case decided by the Court of Appeals of Maryland, wherein it was adjudged, that the president of a moneyed corporation, who was a stockholder therein, might be called as a witness for the adverse party, and compelled to testify against his interest.³ An express provision to the same effect is made in the late revision of the laws of the State of New York.⁴ The note to this provision in the report of the revisors is, that it is intended as declaratory of the rule believed to exist, but sometimes questioned.⁵

¹ *Sutton Coldfield Corporation v. Wilson*, 1 Vern. 254; and see *Steward v. E. India Co.*, 2 Vern. 380; and see 1 Paige, (N. Y.) Chan. R. 601, in the matter of *Kip*.

² In the matter of *Kip*, 1 Paige, (N. Y.) Chan. R. 601.

³ *City Bank of Baltimore v. Bateman*, 7 Har. & Johns. (Md.) B. 104.

⁴ 2 Rev. Stat. 405, 407.

⁵ Revisor's Report, Part 3, ch. 7, tit. 3, § 96. The notes of the revisors are not considered as authorities settling what the law previously was; but

As to whether the confessions of a member may be evidence against the corporation ; the general rule, as to receiving the admissions of one person to the prejudice of another, is that such a practice is warranted, if the parties have a joint interest in possession, and not a mere community of interest.¹ In a case in Great Britain, the admission of a parishioner, liable to be assessed for taxes, was received, on the ground that the parish was an *aggregate company*, of which he was a member.² The ground upon which this case was put, has, however, been deemed questionable in the State of New York ;³ and has been directly overruled, as to a corporation aggregate, in Connecticut.⁴

It was decided in a case before Lord Ellenborough, that the declarations of individual members of a corporation are inadmissible in contradiction of the rights of the corporation, in an action by the corporation. In this case, in order to contravene a right claimed by the city of London to appoint a gauger without the limits of the city, the defendant's counsel, in cross-examination, inquired what the witnesses had heard a certain member of the corporation say respecting it, and contended for the validity of this evidence, as coming from one of the plaintiffs on the record. Lord Ellenborough held, that the declaration of an indifferent member of the corporation could not be conclusive against the body, although he would allow the witness to speak as to any thing he might have heard from the city gauger.⁵

Declarations and admissions of *agents* or *trustees* of a corporation, in their official capacities, both before and after the act of incorporation, are evidence against those whom they represent ;

they may properly be referred to for the purpose of showing, that a particular section was not introduced by them into the statutes as containing a new principle. Per Walworth, Chancellor, in the matter of Kip. *ut supra*.

¹ Gray et al. v. Palmers et al. 1 Esp. N. P. C. 135; Hackley v. Patrick, 3 Johns. (N. Y.) R. 536; Smith v. Ludlow, 6 *ibid.* 267; Whitney v. Ferriss 10 *ibid.* 66.

² King v. Hardwick, 11 East, 578.

³ Osgood v. Manhattan Company, in Error, 3 Cowen, (N. Y.) R. 623.

⁴ Hartford Bank v. Hart, 3 Day, (Conn.) R. 493.

⁵ Mayor of London v. Long, 1 Camp. 22.

though if not made in the transaction of the business of their principal, they are not evidence.¹

One mode of rendering the individual members of a corporation competent witnesses, when they are incompetent for the reasons we have mentioned, is by an assignment of their interest. To prove the truth of the return of a mandamus to restore an alderman, seven freemen were called, who had released to the corporation all advantage, &c., which they could derive, &c. On objection they were rejected; but on motion in arrest of judgment, the court held, that by releasing all the advantage they could derive from the corporation, their competency was restored.² It was made an objection in New York, that a stockholder of a bank was not a competent witness in favor of the bank. The stockholder transferred his stock, and though the transfer was not registered in a book kept for that purpose, according to a provision in the charter, he was permitted to testify.³ Whether, if a bank has forfeited its charter, and is unable from the funds paid in to satisfy its debts, an *original subscriber*, who has transferred his stock, is a competent witness for the bank, to increase its funds — *Query*.⁴

Another mode is by *disfranchisement*. Upon an issue joined on a prescription for a toll, the defendant produced, as a witness, a freeman, who was objected to, as being interested. Upon which the defendant produced a judgment in the Mayor's Court, where, on a *scire facias* awarded, and two *nibils* returned, there had been judgment of his disfranchisement; but it appearing, that the judgment of disfranchisement was irregular, inasmuch as the man had never been summoned, Lord Chief Justice Holt rejected him.⁵ It is said, in another case, if a corporation would examine one of their own members as a witness, they must disfranchise him, and the method to do so is by an information,

¹ *Magill v. Kauffman*, 4 S. & Rawle, (Penn.) R. 317.

² *Enfield v. Hills*, 2 Lev. 236; S. C. Jones, 116.

³ *Bank of Utica v. Smalley*, 2 Cowen, (N. Y.) R. 777; and see ante, Ch. XVI. § 6.

⁴ *Barrington et al. v. Bank of Washington*, 14 S. & Rawle, (Penn.) R. 405.

⁵ *Brown v. Corporation of London*, 11 Mod. 225.

in nature of a quo warranto against him, who, confessing the information, judgment passes to disfranchise him.¹

§ 7. It has been said that a corporation is not indictable, though its particular members are.² But Mr. Kyd apprehends, that this can only apply to the case of crimes and misdemeanors, and that an indictment may lie against a corporation, as well as against a county or parish ;³ and he refers to the precedent of an indictment against the mayor and burgesses of the city of Gloucester for not repairing a gaol.⁴

In indictments *by* a corporation, the proceeding must be in the corporate name.⁵

§ 8. It seems that formerly it was in a degree uncertain, whether defendants, as a politic body, were to answer in a suit against them in equity, under an oath.⁶ It is now, however, well settled, that a corporation aggregate makes its answer, not as in common cases under oath, but under the *common seal*.⁷

In a case in the Circuit Court of the United States, before the late Judge Washington, it was made a question, whether the Court could regard the statement made by the answer of a corporation, so far as it contradicted the allegations of the bill ; the answer being put in, not upon oath, but under the common seal of the corporation. The question was not, whether the answer of an aggregate corporation under its common seal would avail the defendants at the hearing, in like manner as the answer of an individual under oath would ; but whether such an answer, when it

¹ Colchester Corporation v. ———, 1 P. Wms. 595, (note.)

² Per Holt, C. J. Anon, 12 Mod. 559.

³ 1 Kyd, 226, and see People v. Corporation of Albany, 11 Wend. (N. Y.) R. 539.

⁴ In Dogherty's Crown Circuit Assistant, 398.

⁵ Rex v. Patrick, 1 Leach, C. L. 253.

⁶ Acton v. Dean of Ely, Toth. 7.

⁷ Rex v. Windham, Cowp. R. 377 ; 1 Grant, Chan. Prac. 120 ; Brumley v. Westchester Manufacturing Society, 1 Johns. (N. Y.) Chan R. 366 ; Anonymous, 1 Vern. 117 ; Fulton Bank v. N. York and Sharon Canal Co., 1 Paige, (N. Y.) Chan. R. 311.

denies the equity of the bill, is not sufficient to prevent the granting of an injunction, and even to dissolve it after it has been granted. No cases were cited on either side, nor were any authorities relating to the question, within the learned judge's recollection ; but he decided the question upon reasons *ab inconvenienti* as follows ; " I am strongly of opinion, upon principle, that such an answer is sufficient to produce either of the consequences which have been mentioned. The corporate body is called upon, and is compellable, to answer all the allegations of the bill, but can do so under no higher sanction than its common seal. A peer of the realm in England answers upon his honor, the oath *being dispensed with*. In like manner, the plaintiff may, in ordinary cases, dispense with the oath to an answer ; and, if he do so, the court will order the answer to be taken without oath. Now if, in these cases, the answer, denying the equity of the bill, cannot avail the defendant as an answer under oath would do, to prevent the granting of an injunction, or to dissolve it when granted, the legal impossibility to take an oath in the first case, the privilege of the peer in the second, and the dispensation extended to the defendant in the last, would place each of those defendants in a situation infinitely more disadvantageous than that of the other defendants, whose answers cannot be received otherwise than upon oath. Such then cannot be the practice of a court of equity."¹

The caption of the answer of an aggregate corporation is ; " The answer of the above named defendants, the Mayor, Aldermen, &c., (or as the case may be,) was taken under the common seal of the said corporation, as by the said seal affixed appears, at, &c."²

§ 9. In the case of the King v. Dr. Windham, a majority of the body obeyed the process of the Court of Chancery, as far as was within their power, and were ready to put in their

¹ Haight v. Proprietors of Morris Aqueduct, 4 Wash. C. C. R. 601 ; and see Callahan v. Hallowell, 2 Bay, (S. C.) R. 10.

² 1 Grant, Chan. Prac. 123.

answer ; but Dr. Windham, the warden, whose act was necessary to render the answer complete, refused to put the corporate seal to it. This was the first instance of the kind ; and if the regular process of the Court of Chancery for the contempt had issued, it would have punished the corporation at large, when it was not in fault. The Court of Chancery, therefore, stayed its proceedings, in order that an application might be made to the King's Bench for a *mandamus*, to compel the defendant to affix the seal. The application was granted by the Court of King's Bench, Lord Mansfield observing, that it had been truly said, at the bar, that where there is no other legal specific remedy to attain the ends of justice, the course must be by *mandamus*, the very form of which writ shows that its object was to prevent a defect of justice ; thus it came recommended by the Court of Chancery to have it specifically done. Dr. Windham seemed to have misconceived the consequence of his affixing the seal to the answer of the fellows, and to think it would make his corporate answer inconsistent with his private separate answer, for he was of opinion that the plaintiff's suit was just ; but his putting the corporate seal did not contradict his private separate answer ; and by refusing to put it he defeated the end he wished to obtain.¹

§ 10. The proceeding in equity against a corporation, on return of subpoena, affidavit of service, &c., is, instead of an attachment a *distringas* directed to make distress upon their lands and chattels. An *alias* and *pluries* might issue, and lastly, an order for sequestration as in other cases, except that when awarded against corporations, they could not stay it on entering appearance ; and thereupon the complainant's bill might be taken *pro confesso*.² It was laid down by Lord Mansfield, that if a corporation be in contempt for not answering a bill in chancery, the mode of compulsion is by sequestration ; that the plaintiff is to

¹ *Rex v. Windham*, Cowp. R. 377.

² 1 Moulton, Chan. Practice, 230 ; 2 Maddocks, Chan. 203 ; 1 Chan. Cas. 203, 1 Vent. 351 ; 1 Tidd, Practice, 116, and authorities there cited in *notis*. See also *Union Bank v. Lowe*, Meigs, (Tenn.) R. 225.

proceed to take possession of all the personal estate of the corporation; and if that will not make the members agree, he is to take possession by sequestrators of the rents and profit of their real estate.¹

§ 11. The *distringas*, we have said, is the first process against the corporation, after they have refused to answer the bill, having been regularly served with *subpoena*, or other process. This is directed to the sheriff commanding him to distrain the lands, goods, and chattels of the corporation, so that they may not possess them till the court make other order to the contrary, and that in the mean time the sheriff is to answer to the court for what he so distrains, so that the defendants may be compelled to appear in chancery, and answer the contempt. The writ is delivered to the sheriff to execute, who is bound to make return thereof after it is returnable. When the sheriff has made his return, it is to be taken to the plaintiff's clerk in court, who makes out an *alias distringas* to be used and acted upon in the same manner as the *distringas*. Should the defendants still stand out, then when the sheriff has returned the writ, a *pluries distringas* is to be made out, in like manner as the former. This being also returned by the sheriff, counsel is to be instructed to move for a sequestration upon a *pluries distringas* returned against the said corporation to sequester all their lands, chattels, &c., until they appear to or answer the plaintiff's bill, or perform the decree, and the court make other order to the contrary. The sequestration cannot be discharged, until the defendants have performed all they were enjoined to do, paid all costs, and the commissioners their fees.²

Where a *distringas* was issued against a corporation for non-performance of a decree, and afterwards a sequestration *nisi*, for want of appearance, the court ordered the proceedings to go on, notwithstanding three objections taken, and would not allow the company to enter an appearance on the *distringas*, and discharge

¹ Rex v. Windham, Cowp. R. 377.

² 1 Grant, Chan. Prac. 95; Thea. Brev. 144, 145; 1 Tidd, Prac. 107, 109.

the sequestration.¹ A rule to show cause why a *distringas* should not issue will be awarded against a banking company for non-payment of a bill of costs.²

§ 12. The process of sequestration is a writ or commission under the great seal, sometimes directed to the sheriff, or most commonly to four or more persons of the plaintiff's own naming, empowering any two or more of them to enter upon, possess, and sequester the real and personal estate and effects of the defendant, (or some particular part and parcel of the lands,) and to take and keep the profits, or pay them as the court shall appoint, until the parties have appeared to or answered the plaintiff's bill, or performed some other matter which has been ordered by the court, and for not doing whereof he is in contempt.³ A sequestration out of chancery is more effectual than an execution by *fiery facias* at law; for a sequestration may be awarded against the goods, though the party is in custody upon the attachment; whereas at law, if a *ca. sa* be executed, there can no *fiery facias* issue. This writ is always obtained upon motion, *of course*, (not upon petition). The sequestrators should be of sufficient substance to answer what may come to their hands.⁴

Sequestrations, now a common process, are said to have been introduced in Lord Bacon's time;⁵ but it rather seems they were first adopted in the time of his predecessor, Lord Coventry.⁶ North, in his entertaining life of the Lord Keeper Guildford, says, that "Sequestrations were not heard of till the Lord Coventry's time, when Sir John Read lay in the fleet, (with £10,000 in an iron cash chest in his chamber,) for disobedience of a decree, and would not submit and pay the duty. This being repre-

¹ *Harvey v. E. India Co.*, 2 Vern. 395.

² *Orange Co. Bank v. Worden*, 1 Wend. (N. Y.) R. 309; and see 4 Cowen, (N. Y.) R. 111, n. a.

³ Hind. 127, 136; 1 Grant, Chan. Prac. 90.

⁴ Hind. 127.

⁵ 1 Grant, Chan. Prac. 91.

⁶ *Earl of Kildare v. Sir M. Eustace*, 1 Vern. 421.

sent to the Lord Keeper, as a great contempt and affront upon the Court, he authorized men to go and break up his iron chest, and pay the duty and costs, and leave the rest to him, and discharge his commitment. From thence," says North, "came sequestrations, which now are so established as to run of course after all other process fails, and is but in nature of a grand distress, the best process at common law, and after a summons, such as a subpoena is, what need," he observes, "all that grievance and delay of the intervening process?"¹

It is doubtful whether sequestrators can seize the *books, papers, &c.*, of a corporation;² though it seems they may break locks.³ In some cases, where doors were locked and admittance refused to sequestrators, the court has ordered a writ of assistance, in order to put them in possession.⁴

By the New York revised Laws, it is provided, that whenever a judgment at law, or a decree in equity shall be obtained against any corporation, incorporated under the laws of that State, and an execution issued thereon shall have been returned unsatisfied in part or in the whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the Court of Chancery may sequester the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same.⁵ Upon a final decree on any such petition, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order, as is provided in case of a voluntary dissolution of a corporation.⁶

¹ North's Life of Lord Keeper Guilford, vol. 2, p. 73, octavo edit.

² Lowten v. Mayor of Colchester, 2 Merivale, 397.

³ Ibid.

⁴ See Register's Statement of the Practice, 2 Dick. 695, and the cases there cited.

⁵ 2 N. Y. Rev. Stat. 463, § 36.

⁶ 2 N. Y. Rev. Stat. 463, § 37.

§ 13. It is the usual practice to make such of the individual members of a corporation parties, as are supposed to know any thing of the matters inquired after in the bill.¹ As it is not very likely that corporations, in answering under their common seal, will discover any thing to their prejudice, it is common to make the clerk, treasurer, directors, or some of the principal members, in their natural capacities, co-defendants with the corporation. This practice appears, it has been stated, to have commenced in the reign of Charles II., and was afterwards expressly recognised by Lord Talbot.²

In 1623, the members of a corporation, charged as private persons, answered under oath.³ In 1680, upon a bill against a corporation, they answered under their common seal, and so not being sworn would answer nothing to their prejudice; it was ordered, that the clerk of the company, and such principal members as the plaintiff should think fit, should answer on oath, and that a master settle the oath.⁴ One of the officers of the East India Company was made a defendant to a bill of discovery of some entries and orders in their books; defendant demurred, for that he might be examined as a witness, and for that his answer could not be read against the company. The court said, it had been a usual thing for a plaintiff, in order to have a discovery, to make the secretary, book-keeper, or any other officers of a company defendants, who have not demurred, but answered; that there would otherwise be a failure of justice, as the company were not liable to a prosecution for perjury.⁵

The same rule has been recognised in this country; and it was laid down by the Court of Chancery in New York, that individual members of a corporation were compelled to answer, not only with the rest under the common seal, but individually

¹ 1 Grant's Chan. Prac. 28.

² 6 Bacon's Abr. Tit. Cor. (E.) and authorities there cited.

³ Warren v. Feltmakers Co. Toth. 7.

⁴ Anon. 1 Vern. 117.

⁵ Wych v. Meal, 3 P. Wms. 310. This decision has been followed in Moodalay v. Morton, in 1785, 1 Bro. C. C. 469; and as late as 1807, in Dummer v. Chippenham Corporation, 14 Ves. 245.

upon oath.¹ And in another case in the same court, it was held to be well settled, that the officers of the Fulton Bank might be made parties to a bill of discovery, to enable the complainants to obtain a knowledge of facts, which could not be arrived at by the answer of the corporation put in without oath. It was also held, that the corporation ought to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose to exist.²

The well established general rule, then, we perceive, that a mere witness cannot be made defendant, has been relaxed in the case of a corporation. This relaxation is on the ground, that the answer of a corporation is not put in under oath, and that hence an answer is required from some person capable of making a full discovery, as the agents or the officers of a corporation. It was stoutly contended in a case in the English Court of Chancery, in the year 1807, that the exception to the general rule, we have referred to, was applicable only to agents and officers, or to persons who stood in a confidential situation. The case stated is in substance, that the plaintiff being fully capable of executing the duty of a schoolmaster, was appointed and had long been continued in that character; that at the election of members of parliament for the borough of Chippenham, certain individuals and members of the corporation wished that he should give his vote against his own judgment, in favor of a particular candidate; that, meaning to procure that vote, they gave him an intimation, that if he would not vote according to their wish, he would be immediately dismissed; that he voted contrary to their wishes; and then the five individuals, in the execution of their corrupt purpose, found the means of making the corporation the means of dismissing him. The bill prayed that the bailiff and burgesses might, in their corporate capacity, answer their matters in the usual way, but that the five defendants, particularly named in the

¹ *Brumley v. Westchester Manufacturing Society*, 1 Johns. (N. Y.) Ch. R. 366.

² *Vermilyea v. Fulton Bank and others*, 1 Paige, (N. Y.) Ch. R. 37.

bill, might answer upon oath. To this bill the five defendants demurred, insisting, that the plaintiff had not shown a title to discovery against them, they being mere members of the corporate body, not standing in any official or confidential situation. The Chancellor observed that the case was in many points very important, and was quite new to him ; but he thought there was no sound distinction between an individual, and the town clerk or servant. There might be, he said, no officer for the time, and the individual might perhaps be the only person who could give any information. He referred to the English Chancery cases which we have cited ; and from those cases he was able to extract the principle, that a bill might be entertained against the individuals, and that they could be called on under the circumstances for an answer.¹

It is proper to refer to another ground of demurrer which, in the above case, was laid before the Court *ore tenus*, viz., that every charge in the bill was made with the view to the discovery of an illegal conspiracy, which was an *indictable offence*. The Chancellor was perfectly satisfied, as to this demurrer, that if he allowed it, he should destroy the jurisdiction of his Court, as without the ordinary words, charging the parties with combining and confederating, in nine cases out of ten from all time past, they would, upon modern doctrine, be liable to indictment ; yet Courts of Equity have been constantly compelling the discovery.

¹ *Dummer v. Corporation of Chippenham*, 14 Vesey, 245. The counsel for the defendants in this case relied upon *Steward v. East India Company*, 2 Vernon, 380 ; but Sir Samuel Romilly, counsel for the plaintiff, said it was among the many bad cases in that book ; and the Chancellor said he suspected a misprint. As it stood, observed the latter, that the demurrer was allowed without putting them to answer as to matters of fraud and contrivance, it was nonsense ; but if it was read, that the demurrer was disallowed, with liberty to insist by their answer, that they should not answer the charges of fraud and contrivance, it was unintelligible. As it stood, he could not comprehend it, unless the argument could be maintained, that the demurrer was allowed, as otherwise they would be put to answer those charges.

§ 14. It appears to have been held in the State of New York, that an injunction against a corporation cannot be dissolved on bill and answer, unless the answer is duly verified by the oath of some of the individual members, who are acquainted with the facts stated therein. On a motion to dissolve an injunction against a Canal Company, upon bill and answer, B. & R., two former officers of the company, were made defendants for the sake of discovery merely. The answer of the company was put in under their corporate seal; and the then secretary, who was not an officer of the company, at the time of the transactions which were the foundation of the injunction, swore that the matters stated in the answer relating to his acts and deeds were true, and so far as related to the acts and doings of other persons, he believed them to be true. The president, who was an officer of the company at the time of those transactions, swore to the seal of the company affixed to the answer, but said nothing as to the truth of the matters stated therein. The separate answer of B. admitted the truth of the principal allegations contained in the bill. The motion was denied with costs, the Chancellor observing; the case of a corporation defendant is an anomaly in the practice in relation to the dissolution of an injunction. In most cases the injunction is dissolved as a matter of course, if the answer is perfect, and denies all the equity of the bill in the points upon which the injunction rests. It is not, however, a matter of course to dissolve the injunction where the defendant acts in a representative character, and founds his denial of the equity of the bill upon information and belief only. Corporations answer under their seal and without oath. They are therefore at liberty to deny every thing contained in the bill, whether true or false. Neither can any discovery be compelled, except through the medium of their agents and officers, and by making them parties defendants. But no dissolution of the injunction can be obtained upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person who is acquainted with the facts contained therein. There can be no hardship in this rule as applied to corporations, as it only puts them in the same situation with other parties. Other

defendants can only make a positive denial as to facts within their own knowledge. In relation to every other matter, they must answer as to information and belief. If the agents of the institution, under whose direction the answer is put in, are acquainted with the facts, so as to justify a positive denial in the answer, they can verify its truth by a positive affidavit; and if none of the officers are acquainted with the facts, their information and belief can have no greater effect than that of ordinary defendants, however positive the answer in the denial may be. In this case, the officer of the institution, who was such at the time referred to in the claimant's bill, has studiously avoided saying any thing as to the truth of the answer, leaving it to the secretary, who knows nothing of its truth or falsehood, to express his belief on the subject.¹ This view of the subject seems to differ from that expressed by Mr. J. Washington, in the case of *Haight v. The Morris Aqueduct*.²

§ 15. As the general rule, corporation books are evidence of the acts and proceedings of the corporate body, when it appears that they are kept as such by the proper officer, or some person authorised to make entries in his necessary absence.³ Thus we have seen, that the books and minutes of a corporation, if there is nothing to render them suspicious, may be referred to, in order to

¹ *Fulton Bank v. New York and Sharon Canal Company et al.* 1 Paige, (N. Y.) Ch. R. 311.

² 4 Washington, C. C. R. 600, and cited in this Chap. (ante, § 8) more fully.

³ *Rex v. Mothersell*, 1 Stra. 93; *Highland Turnpike Company v. M'Kean*, 10 Johns. (N. Y.) R. 154. Entries in Corporation books, and in the books of public companies, relating to things public and general, and entries in other books, may be proved by examined copies. 1 Stra. 93, 307. Entries in the books of the Custom House, of the Bank of the E. India Company, of the South Sea Company, and the like, may be proved in this manner. 2 Ld. Raymd. 851; 2 Stra. 594, 605; Hardw. 128; 2 Doug. 593, n. 3; Peake, 30; 4 Taunt. 787. But instruments of a private nature, such as a letter found in a corporation chest, (1 Stra. 401,) or the like; must be proved in the ordinary way, as any other private instrument. So, the books of a private company must be produced, and they cannot be proved by examined copies. 9 Petersdorf, Abr. 212, Tit. Ev.

show the regularity and legality of corporate proceedings, &c.¹ But entries, which are made in corporation books, of matters relative to any property or right claimed by them, can never be evidence for them,² unless made so by act of the legislature.³ It is true, the following case is to be found in the English books. In an action by a corporation for non-payment of certain tolls, called "water bailiff's dues," an entry had been made in the corporation books, as follows; "A particular note of all such duties, &c., as by the water bailiffs are to be received for the use of the mayor and burgesses of Kingston, according to the order prescribed and set down in the year 1441, J. B. then being mayor, and continued and put in use from that time to the present day." This was permitted to be given in evidence.⁴ This case was afterwards cited before Wilson, J., who said he was counsel in the case, and that the books were admitted by consent.⁵ In the Supreme Court of New York, entries that were made by a clerk in the books of trustees, being a corporation, by the direction of the trustees, were considered not evidence in a cause in which they were interested.⁶ The English Court of Chancery has recently decided, that private entries in the books of a corporation, which are under their own control, and to which none but the corporation have access, cannot be used to establish rights of the corporation against third parties. In this case the question was, to whom the nomination of a curate belonged, — to the vicar or to the corporation. Entries in their books were not received in

¹ Anté, Chap. XIV. § 12, and Chap. XVIII. § 2; *Coffin v. Collins*, 17 Maine R. 444; *Buncombe Turnp. Co. v. McCarson*, 1 Dev. & Bat. (N. C.) R. 306; *Mayor, &c.*

v. Wright, 2 Port. (Ala.) R. 230; *Owing v. Speed*, 5 Wheat. R. 420.

² 3 B. & Ald. 142.

³ 1 M. & Sel. 569.

⁴ *Mayor of Hull v. Horner*, Cowp. R. 102.

⁵ *Mayor of London v. Lynn*, 1 H. Bla. 214, n. The Court, in this case, refused to permit the defendants to give in evidence their corporation books to prove their own rights.

⁶ *Jackson ex dem; Donally v. Walsh*, 2 Johns. (N. Y.) R. 226. Nor is the evidence of the clerk, who made the entries of the declarations of the trustees, admissible.

evidence to establish the right of the corporation, as against the vicar.¹

It has been decided in New York, that if a dealer with a bank send his bank book, with money to be deposited, and the clerk enter the amount to his credit in the bank book, at the time the deposit was made, it is conclusive on the bank ; but *aliter*, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank book.² In Massachusetts, the books of a bank are deemed evidence to prove receipts and payments of money ; and if the clerk, who made the entries be dead or insane, the book is admissible, proving his hand writing.³

§ 16. With respect to the members of a corporation, the books of the company are public books ; they are common evidence, which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them has a right to inspect, and to use them as evidence of his rights.⁴ The board of directors of a bank have no authority to pass a resolution excluding one of the members of the institution from an inspection of its books, although they believe him to be hostile to the interests of the institution.⁵ But with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. This was decided after much consideration in the case of *The Mayor of Southampton v. Greaves*,⁶ notwithstanding several modern cases, in which the granting such applications, in case of corporations, seemed to have been considered as a matter of course.⁷ In that case the corporation brought an action against the defendant for tolls, and the Court denied an application to inspect. A similar

¹ *Attorney General v. Corporation of Warwick*, 4 Russ. 222.

² *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) R. 377.

³ *Union Bank v. Knapp*, 3 Pick. (Mass.) R. 196.

⁴ 2 Starkie on Evid. 734.

⁵ *People v. Throop*, 12 Wend. (N. Y.) R. 183.

⁶ 8 T. R. 590 ; see the opinions of Lord Hardwicke and C. J. De Grey there cited.

⁷ *Mayor of Lynn v. Denton*, 1 T. R. 689, 3 T. R. 303 ; *Mayor of London v. Lynn*, 1 H. Bl. 511 ; and see *Davies v. Humphreys*, 3 M. & Sel. 223.

application had been refused in an action of trespass, where the defendant justified under the corporation of Ipswich, for distraining for a toll for repairing the quay,¹ and in many other instances.²

In the case of the *Utica Bank v. Hilliard*,³ it was held, the defendant could not compel the cashier of the bank to produce the books and papers, by a *subpoena duces tecum*. The Court said, the course for proving the books or papers of a bank, when it is the adverse party, is to give notice to produce them, and on its non-compliance, to show the contents by inferior evidence in the cause. "The effect of this motion for a *duces tecum*," said the Court, "would be to compel a party to produce evidence against himself; true, the books are ordinarily in possession of the cashier; how? He holds them as the officer, the agent, or the servant of the bank; in the same manner as an attorney holds the papers of his client. The cases, in which the production of papers may be coerced by *subpoena*, are, where they are the property of a competent witness; or at least, where they do not belong, exclusively, to the adverse party; when he can say, *these are my papers*."⁴ A bank depositor, it has been held in Massachusetts, has a right, on proper occasions, to inspect the bank books; the bank officers having charge of them, being so far agents of both parties.⁵

§ 19. In an action of debt for the penalty of a by-law, the time when it was made, the parties by whom it was made, their authority to make it, the by-law itself, and the breach of it by the defendant, must be set forth; that the Court may judge both whether the by-law be good, and whether the defendant be a proper object of the action.⁶

¹ Per Lawrence, J., 8 T. R. 595; *Hodges v. Atkins*, 3 Wils. 398.

² 2 Starkie on Evid. 734.

³ 5 Cowen, (N. Y.) R. 419.

⁴ See 6 Cowen, (N. Y.) R. 62.

⁵ *Union Bank v. Knapp*, 3 Pick. (Mass.) R. 96.

⁶ Kyd, 167; Hob. 211; 1 Stra. 539; *Stuyvesant v. Mayor, &c. of New York*, 7 Cowen, (N. Y.) R. 608; see Chap. X. § 8.

CHAPTER XIX.

OF THE VISITATORIAL POWER.

§ 1. To render the charters or constitutions, ordinances, and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to *visitation* ; or in other words, to the inspection and control of tribunals recognised by the laws of the land. Civil corporations are visited by the government itself, through the medium of the courts of justice ;¹ but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.² This difference in the tribunals naturally results from a difference in the nature and objects of corporations. Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power, whose duty it is to take care of the public interest ; whereas, corporations, whose object is the distribution of a private benefaction, may well find jealous guardians in the zeal or vanity of the founder, his heirs, or appointees.

Lord Mansfield, in commenting upon the convenience of the tribunal of a visitor, observes ; “ It is a *forum domesticum*, calculated to determine *sine strepitu* all disputes that arise within

¹ 2 Kyd on Corp. 174 ; 2 Kent, Comm. 241 ; Amherst Academy v. Cowles, 6 Pick. (Mass.) R. 433, Parker, C. J. ; Binney's Case, 2 Bland. (Md.) Ch. R. 141.

² Per Holt, C. J., 1 Show. 252 ; 1 Black. Comm. 480 ; 2 Kyd on Corp. 174 ; 2 Kent, Comm. 240 ; Binney's Case, 2 Bland. (Md.) Ch. R. 141. In Murdock's Appeal, 7 Pick. (Mass.) R. 303, it was held, that the common law of England, as to the visitation of eleemosynary corporations, is the law of Massachusetts, except so far as it has been repealed, as to the visitors of Phillips Academy, by the statute of 1823, ch. 50, § 3, which gives a limited appeal to the Supreme Court from their decrees or sentences.

learned bodies ; and the exercise of it is in no instance more convenient, than in that of elections. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty ; while he, who has the right, may possibly be kept out of the profits, of what is in itself but a temporary subsistence. This power, therefore, being exercised properly and without parade, is of infinite use.”¹ In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuses or neglects, which at common law would cause a forfeiture of their charters.²

The visitatorial power, in England, of the bishop over the ecclesiastical corporations within his diocese, finds its origin and rules in the ecclesiastical polity of that country ; and as this does not apply to our religious institutions, we propose in this chapter to treat of the power of visitation, in reference to eleemosynary corporations only.

§ 2. Private and particular corporations, founded and endowed by individuals for charitable purposes, are, without any special reservation of power to that effect, subject to the private government of the founder and his heirs ; not from any ecclesiastical canons or constitutions, but by appointment of law, as an incidental right, arising from the property which the founder had in the land or funds assigned to support the charity.³ The origin

¹ *The King v. the Bishop of Ely*, 1 Black. R. 82.

² *Amherst Academy v. Cowles*, 6 Pick. (Mass.) R. 443, Parker, C. J.

³ Per Holt, C. J., *Phillips v. Bury*, Skin. 447 ; S. C. 1 Ld. Raymd. 5 ; S. C. 2 T. R. 346 ; Ca. Parl. 45. To this celebrated judgment of Lord Holt we would refer our readers, as it is reported in 2 T. R. 346, from his Lordship's own manuscript. *Eden v. Foster*, 2 P. Wms. 326 ; *Attorney General v. Rigby*, 3 P. Wms. 145 ; *Green v. Rutherford*, 1 Vea. 472 ; *Attorney General v. Gaunt*, 3 Swanst. 148, n. 1 ; *The Case of Queen's Coll. Camb.* 1 Jac. R. 20, 400 ; *Dartmouth College v. Woodward*, 4 Wheat. R. 673, 674, per Story, J. ; *Murdock, appellant*, &c. 7 Pick. (Mass.) R. 322, per Parker,

of such a power, says Lord Hardwicke, is the property of the donor, and the power every one has to dispose, direct, and regulate his own property ; like the case of patronage ; *cujus est dare, ejus est disponere* ; and therefore, if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder, or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creature.¹ Although the rule, that in the absence of any appointment of visitors by the founder, the visitatorial power rests in his heirs, seems always to have been recognised as law in this country, yet the difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children, male and female, indifferently, is such as would render the rule extremely difficult of application in practice, especially after a considerable lapse of time and many descents cast. If such inconveniences are found to be numerous and formidable in practice, the remedy, it is presumed, must be sought in legislative interposition.² But the founder may, if he please, at the time of endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it to the exclusion of the founder's heirs.³ No technical terms are necessary to assign or vest the visitatorial power ;⁴ it

C. J. ; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) R. 244 ; *Allen v. M'Keen*, 1 Sum. C. C. R. 276 ; *Sanderson v. White*, 18 Pick. (Mass.) R. 334, 335, Shaw, C. J.

¹ *Green v. Rutherford*, 1 Ves. 472, per Lord Hardwicke ; *Eden v. Foster*, 2 P. Wms. 325 ; *Gilb. Eq. R.* 78 ; *Sel. C.* in Ch. 36 ; *Attorney General v. York Archbishop*, 2 Russ. & Mylne, 717.

² *Sanderson v. White*, 18 Pick. (Mass.) R. 335, 336, where see the subject briefly and luminously discussed by Mr. C. J. Shaw.

³ *Eden v. Foster*, 2 P. Wms. 325 ; *Attorney General v. Middleton*, 2 Ves. 327 ; *St. Johns College v. Todington*, 1 Bl. R. 84 ; *S. C.* 1 Burr. 158 ; *Attorney General v. Clare College*, 3 Atk. 662 ; *S. C.* 1 Ves. 78 ; *Dartmouth College v. Woodward*, 4 Wheat. R. 674, per Story, J. ; *Murdock's Appeal*, 7 Pick. (Mass.) R. 322, per Parker, C. J. ; *The King v. The Bishop of Worcester et al.* 4 M. & S. 415.

⁴ *Sic Visitor*, or "Let him be a visitor," in the charter or statutes, is suf-

is sufficient, if from the nature of the duties to be performed by particular persons under the charter it can be inferred, that the founder meant to part with it in their favor. The power to interpret the statutes of the foundation, it is said, constitutes a visitor.¹ And the founder may divide the visitatorial power among various persons, or subject it to any modifications, or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee.² A direction to a visitor to visit yearly, *et si quid reperit corrigendum*, to amend it, are sufficient words to create a general visitatorial power.³ In the construction of charters, it is said too to be a general rule, that if the objects of the charity are incorporated, as the master and fellows of a college, or the master and poor of an hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character.⁴ The visitatorial power over colleges, academies, and schools, in this country, together with all other powers, franchises, and rights of property belonging to them, are usually vested in boards of trustees or overseers, established by charter, who have a permanent title to their offices, which can be divested only in the manner pointed out in the charter.⁵ It is held a material objection to the visitatorial power

ficient to vest general visitatorial power in the person of whom it is said. *The King v. The Bishop of Ely*, 1 Black. R. 83; *Attorney General v. Middleton*, 2 Ves. 327; *The King v. the Bishop of Worcester et al.* 4 M. & S. 415; *Sanderson v. White*, 18 Pick. (Mass.) R. 338, 339, Shaw, C. J.

¹ *Rex v. Bishop of Ely*, 1 Black. R. 85; but see *Kirkby Ravensworth Hospital*, 8 East, 221.

² *Ibid*; *Green v. Rutherford*, 1 Ves. 473.

³ *Attorney General v. Talbot*, 3 Atk. 674; 1 Ves. 78.

⁴ *Phillips v. Bury*, 1 Ld. Raymd. 5; S. C. 2 T. R. 346; *Green v. Rutherford*, 1 Ves. 472; *Attorney General v. Middleton*, 2 Ves. 327; *Case of Sutton Hospital*, 10 Co. 23, 31; *Dartmouth College v. Woodward*, 4 Wheat. 674, 675, per Story, J.; *Fuller v. Plainfield Academic School*, 6 Conn. R. 544, 545; *Sanderson v. White*, 18 Pick. (Mass.) R. 338, 339, Shaw, C. J.; 2 Kent, Comm. 242; 2 Kyd on Corp. 195.

⁵ *Dartmouth College v. Woodward*, 4 Wheat. R. 518; *Allen v. McKeen*,

of the governors or trustees over the application of the revenue, that the estate and revenue of the charity is vested in them; since they might misapply the fund, and cannot visit themselves. But it has never been held, that the governors cannot be visitors, in this particular, merely because the legal estate of the charitable fund was in them, the revenue to be received and accounted for by others.¹

§ 3. The incidental power of one, appointed visitor generally, may be inferred from his duty to inspect and regulate the affairs of the charity. He may examine into and regulate the conduct of members who partake of the charity, correct abuses, remove officers, and in case of a college, expel or admit a fellow, and generally superintend the management of the trusts.² The visitors of William and Mary College have power to change the schools, and put down the professorships of the college, and their statutes discontinuing a grammar school in that institution were valid, and the professorship was thereby rightfully abolished, together with the salary of the professor.³ But where the visitatorial power of an academic school was lodged in a body of trustees, it was held, that they could not remove one of their number for misconduct, though they had power by charter to supply vacancies occasioned by death, or non-residence within a specified district, and might displace any officer appointed by

1 Sumn. C. C. R. 276; *Bracken v. William & Mary College*, 1 Call (Virg.) R. 161; 3 Call, 573; *Sanderson v. White*. 18 Pick. (Mass.) R. 338, Shaw, C. J.

¹ *Attorney General v. Middleton*, 2 Ves. 329; *Sutton's Hospital*, 10 Co. 21; *Eden v. Foster*, 2 P. Wms. 327; *Phillips v. Bury*, 2 T. R. 352, 353; *Fuller v. Plainfield Academic School*, 6 Conn. R. 545, 547.

² *Coveney's Case*, Dyer 209; *Bagg's Case*, 11 Co. 99; *Phillips v. Bury*, 2 T. R. 353; *Attorney General v. Talbot*, 1 Ves. 78, 79; *Attorney General v. Middleton*, 2 Ves. 330; *Dartmouth College v. Woodward*, 4 Wheat. 676, per Story, J.; *Murdock's Appeal*, 7 Pick. (Mass.) R. 322; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) R. 244; *Sanderson v. White*, 18 Pick. (Mass.) R. 334; 2 Kent, Comm. 241, 243; *Bracken v. Wm. & Mar. College*, 3 Call, (Virg.) R. 573; 2 Kyd, on Corp. 195.

³ *Bracken v. William & Mary College*, 1 Call, (Virg.) R. 161; 3 Call, (Virg.) R. 573.

them. This decision proceeded upon the ground, that they could not visit themselves, or each other ; could not be visitors and visited.¹ The power of making new statutes, of repealing or amending the old, may be, and frequently is, communicated to the governors, trustees, and visitors of the foundation.² It has even been attributed to them as incidental to their general power of visitation ; but upon principle and precedent, this may well be doubted.³ If a person is constituted visitor in general terms, whatever comes in derogation of his power must be expressed, otherwise he is *pleno jure*.⁴ A clause of distress, given to an injured person, does not take away the party's remedy by application to the visitor.⁵ In some instances the power of the visitor is regulated by statutes or ordinances imposed by the founder ; and in such, it must be gathered from the whole purview of the statutes considered together ;⁶ for though the founder appoint a general visitor, he may except some particular cases out of his general jurisdiction.⁷ And where, by the rules of the founder, the visitor must, in order to remove the rector of a college, have the consent of the four senior fellows, though he may have suspended some of the four, their consent is nevertheless essential to the removal, since though they are suspended, their places are full.⁸ Where there are particular statutes, they are the rule of the visitor ; if he acts contrary to, or exceeds them, he acts without his jurisdiction ; and the question being still open, whether he has acted within his jurisdiction or not, if not, his act is a nullity,⁹ except under certain circumstances in England, where the king is visitor.¹⁰ But though the tenure of a professor's office, in a the-

¹ Fuller v. Plainfield Academic School, 6 Conn. R. 545.

² Chap. X, § 2.

³ Ibid.

⁴ The King v. The Bishop of Worcester et al., 4 M. & S. 415.

⁵ The King v. The Bishop of Ely, 1 Black. R. 89.

⁶ The King v. The Bishop of Ely, 1 Black. R. 52, 71, 84.

⁷ Ibid. 84, per Ld. Mansfield.

⁸ Phillips v. Bury, 2 T. R. 350, 351.

⁹ Green. v. Rutherford, 1 Ves. 472, per Lord Hardwicke ; Phillips v. Bury, 2 T. R. supra, per Holt, C. J.

¹⁰ Case of Queen's Coll. Camb. 1 Jac. R. 20.

ological school, be, by the statutes of the foundation, during good behavior, yet it is forfeited upon the honest judgment of the proper tribunal, that he has ceased to behave well, in the sense attached to the phrase by the founders.¹ If the words "*shall and may*" are used in a general act, or in the constitution of a private charity, they are to be construed imperatively, in the same manner as the word "*must*;" as, if the founder's constitution of the charity declares, that if certain officers are found guilty of immorality, drunkenness, or any debauchery, the governors and visitors "*shall and may* remove them;" an obligation to remove for these causes is imposed.² In some instances, the power of the visitor is entirely uncontrolled by statutes or ordinances; when, having no guide but his own discretion,³ with which no person has a right to interfere,⁴ his power is arbitrary. Where a new donation is made to, or a new fellowship ingrafted on, an existing eleemosynary corporation, it is subject to the rules and statutes, and of consequence, to the visitatorial power of the visitor of the old foundation, unless the new founder prescribe rules of his own.⁵ Though the visitor of a college have a jurisdiction over matters of election, he has no right to appoint to a vacant office in default of the electors; and, if the statutes, in default of an election by the college, by express provision give the appointment to the same person who is general visitor, he has that appointment not as visitor, but by virtue of that express provision.⁶ The tribunal of the visitor

¹ Murdock's Appeal, 7 Pick. (Mass.) R. 303.

² Attorney General v. Locke, Case of Morden College, 3 Atk. 166, per Lord Hardwicke.

³ Attorney General v. Governors of the Foundling Hospital, 2 Ves. jr. 42; S. C. 4 Bro. C. C. 167.

⁴ Ibid. Attorney General v. Talbot, 1 Ves. 78; Show. P. C. 51; 3 Atk. 675; Bedford Charity, 2 Swanst. 479; Attorney General v. Middleton, 2 Ves. 328.

⁵ Case of University of Oxford, cited 1 Burr. R. 203; Attorney General v. Talbot, 1 Ves. 79; S. C. 3 Atk. 674; Green v. Rutherford, 1 Ves. 467, 468, 472; St. John's College, Cambridge, v. Todington, 1 Burr. R. 202, 203, 204; S. C. 1 Black. R. 51, 71, 82, 89.

⁶ Rex v. The Bishop of Ely, 2 T. R. 290, 345; and see Bishop of Chichester v. Harward and Webber, 1 T. R. 650; Rex v. Bishop of Chester, 1 Wils. 206.

is strictly domestic ; and hence, he cannot act on a proceeding by a third person against the corporation, for the specific performance of an agreement. An application to the visitor in such a case would be nugatory ; for he cannot compel a specific performance.¹ Upon the same principle, where an estate is vested in the corporation in trust, the visitor can give no remedy upon it, but application must be made to Chancery.² Again, independent members of colleges in the universities, or fellow-commoners, who are mere boarders, and have no corporate rights, are not subject to the jurisdiction of the visitor, and cannot obtain redress for any grievances, by appealing to him.³ Neither in a matter, which concerns the discipline of the college, can an independent member have redress in a court of law.⁴ A person, however, who, though not yet a member of an eleemosynary corporation, claims a right to become one, may, it seems, be a proper subject of visitatorial jurisdiction, and prefer his claim to the visitor ; since the question is one that concerns the constitution of the corporation.⁵ A visitor cannot visit himself, or inquire into and decide upon the propriety of his own conduct, unless *expressly* empowered by the founder ; for this would be to determine upon his own right.⁶ Upon this ground it was held, in case of a spiritual corporation, that where the express visitor had taken an office involving the performance of certain duties, a mandamus might go to him to compel the performance of those duties, his visitatorial power being suspended during his continuance in that office.⁷ As the forum of the visitor is domestic, his power is confined to

¹ *Rex v. Dr. Windham, Warden of Wadham College*, Cowp. 377, 378.

² *Green v. Rutherford*, 1 Ves. 470, 474.

³ 1 Kyd on Corp. 330 ; *Ex parte Davison*, cited Cowper, 319 ; and in 2 Kyd on Corp. 240, 241, 242, 243.

⁴ *Rex v. Grundon et al.*, Cowp. 315, 322.

⁵ *Rex et Reg. v. St. John's College, Oxford*, 4 Mod. 260 ; Comb. 238 ; 2 Kyd on Corp. 248.

⁶ *The King v. The Bishop of Ely*, 2 T. R. 338, 339, per Buller, J. ; *The King v. The Bishop of Chester*, 2 Str. 797 ; *Green v. Rutherford*, 1 Ves. 471 ; *Fuller v. Plainfield Academic School*, 6 Conn. R. 544, 545.

⁷ *Rex v. Bishop of Chester*, 1 Stra. 797. And see § 5 of this Chapter, as to the remedy in such case.

offences against the private laws of the corporation ; and he has no cognizance of acts of disobedience to the general laws of the land. Thus, several fellows of a college refused to take the oaths of supremacy and allegiance imposed by a general statute, whereupon a mandamus was issued from the Court of King's Bench to the master, commanding him to remove those fellows. On the return of the writ, one principal objection was, that there was a visitor, who ought to take cognizance of the matter ; but the Court, on the principle above stated, held, that this was not a proper subject of the visitatorial jurisdiction, and that therefore, it was proper for the King's Courts to interpose.¹ A visitor may however, proceed upon a grievance done in the time of his predecessor.² In case of a private, particular, limited jurisdiction, and of Courts proceeding by rules different from the general law of the land, no appearance, answering, or pleading by the party, will give a jurisdiction to the Court ; but if there is a want of jurisdiction in the cause, it may be called in question at any time, even after sentence. Upon this principle, it was held by Lord Hardwicke, that a party's answering to an appeal before a visitor, by no means concluded him upon the question of the visitor's jurisdiction ; but that, notwithstanding such answer, he might contest the validity of the sentence upon that ground, either in a direct or collateral action or suit.³

§ 4. If the statutes of the foundation direct the mode in which the visitatorial power shall be exercised, that mode must be pursued, otherwise the sentence is a nullity.⁴ But it should be recollected, that though a mode of visitation is prescribed in any particular case, this will not take away the general powers incidental to the office of visitor.⁵ Thus, though a visitor be restrained by the constitution of a college from visiting *ex officio* more than once in five years, yet as visitor, he has a standing, constant authority at

¹ Rex et Reg. v. St. John's College, 4 Mod. 233.

² Case of All-souls, Oxford, Skin. 13 ; 2 Show. 170.

³ Green v. Rutherford, 1 Ves. 471.

⁴ Phillips v. Bury, 2 T. R. 348, per Holt, C. J.

⁵ The King v. the Bishop of Ely, 1 Black. R. 83, per Lord Mansfield.

all times to hear the complaints, and redress the grievances of the particular members ; for visiting is one act, in which he is limited to time ; but hearing appeals, and redressing grievances, is his proper office and work at all times.¹ The case is analogous to that of the bishops of England, who can visit but once in three years ; but their courts are always open to hear complaints, and determine causes.² Accordingly, where one came, upon the commission of the visitor of a college, to examine the appeal of an expelled fellow, it was held no visitation ; for it was only a commission upon a particular complaint, made by a single expelled fellow, for an injury supposed to be done to him.³ By the constitution and statutes of a college, a visitation could last but three days. The visitor appointed a visitation to be held in the chapel on the sixteenth of June ; when he found that the doors were shut, that the rector and scholars would not open them, but protested in the area against the visitation. He called over the names of the rector and scholars, and swore one to prove the summons, and went away without doing any thing more. After this, another visitation was appointed to be held in the hall on the 24th of July ; at which time the visitor repaired thither, and divers protestations against the visitation were made ; but he proceeded, called over the names, registered the act of the 16th of June, and upon several warnings to appear, the rector and divers of the fellows absenting themselves, and refusing to submit to the visitation, were pronounced contumacious, and the rector was afterwards deprived. It was objected, that, inasmuch as the visitor administered an oath in June, and made an act of it in July, this was tacking the visitation of the one time to that of the other, so that it continued much longer than it could by the constitution and statutes of the college. Lord Holt however held, and his decision was afterwards confirmed by the House of Lords, that “ when he was hindered in June, and made an act of

¹ *Philips v. Bury*, 2 T. R. 348, per Holt, C. J ; *The King v. the Bishop of Ely*, 1 Black. R. 83, per Lord Mansfield ; *Attorney General v. Price*, 3 Atk. 103.

² *Philips v. Bury*, *supra*.

³ *Ibid*.

this at his visitation in July, that was only in order to his calling them to account for their contumacy, and to bring them in judgment at his visitation ; that, it was no more than taking an affidavit of the service of his citation. If, continues he, " that which was done in June should amount to a visitation, it would be in the power of the rector and fellows by their contumacy, at any time, to hinder the effect of a visitation, and such their contumacy would never be punished." ¹ If an appeal is exhibited to a visitor he must take it ; ² and if he will not, a mandamus lies to compel him to exercise his visitatorial power, by receiving and hearing the appeal. To use an expression of Lord Kenyon's, the court will put the visitatorial power in motion. ³ It seems, however, that the court will not grant a mandamus directed to one in such case, unless it can be clearly made out, that he is visitor. ⁴ A visitor is certainly not bound to proceed according to the rules of the common law, nor according to any exact *forms* of proceeding ; ⁵ but unless there be a general visitation of the college, there should be an appeal, and he should proceed upon that. ⁶ He must inhibit all proceedings against the appellant, until the appeal be determined ; ⁷ direct the complaint, to which an answer is required, to be put in writing, fully, plainly, substantially, and formally ; ⁸ summon all parties concerned to appear before him ; ⁹

¹ Philips v. Bury, 2 T. R. 346 to 349 ; S. C. 1 Ld. Raym. 5 ; S. C. 4 Mod. 106 ; S. C. Skin. 447 ; S. C. Ca. Parl. 42.

² Ayl. H. of Oxford, vol. 2, p. 81 ; Com. Dig. Visitor, C.

³ The King v. the Bishop of Lincoln, 2 T. R. 338, n. a. ; The King v. the Bishop of Ely, 2 T. R. 338 ; the King v. the Bishop of Ely, 5 T. R. 447 ; the King v. the Bishop of Worcester et al, 4 M. & S. 415.

⁴ Rex v. Episcopum Eliensis, 1 Wils. 266 ; S. C. 1 Black. R. 52.

⁵ Bishop of Ely v. Bentley 2 Bro. P. C. 220 ; Case of Queens College, 1 Jac. 19 ; Murdock v. Phillips Academy, 12 Pick. (Mass.) R. 262, 263, Shaw C. J.

⁶ The King v. the Bishop of Ely, 2 T. R. 338, per Buller, J.

⁷ Com. Dig. Visitor, C.

⁸ Com. Dig. Visitor, C. ; Murdock's Appeal, 7 Pick. (Mass.) R. 330, per Parker, C. J. ; Murdock v. Phillips Academy, 12 Pick. (Mass.) R. 266, Shaw, C. J.

⁹ Ibid ; the King v. the Bishop of Ely, 2 T. R. 338, per Buller, J.

and allow a convenient time for an answer, and for the examination of witnesses.¹

The proceeding before visitors, for the removal of a professor, is a judicial proceeding, and to render it binding on him, there must be a monition or citation to him to appear, a charge given to him, which he is to answer, a competent time assigned for proofs and answers, liberty for counsel to defend him, and to except to proofs and witnesses, and a sentence after a hearing of all the proofs and answers. It is not indeed to be insisted on, that in exercising the powers vested in a new jurisdiction, where no forms are prescribed, any precise course as to forms is to be followed ; but these rules must in substance be pursued by every tribunal acting judicially upon the rights of others.²

It is no objection to a sentence of a board of visitors, that they refused to conduct the trial with open doors, or to admit any persons within the room in which their sittings were held, but those who were engaged in the trial, and not even witnesses, except one by one as they were examined.³ And where an officer of a Theological Institution, being removed by the trustees, appealed to the visitors, whose duty it was to hear the whole case anew, and they affirmed the removal, it was held, on appeal to the Supreme Court of Massachusetts, such an appeal being authorized by the incorporating act of the institution, that any irregularity or injustice in the proceedings before the trustees was immaterial, their sentence being entirely vacated by the appeal to the visitors.⁴ It is said, that if the visitor proceed on a citation, professedly founded on an authority, which it afterwards appears he did not possess, his whole proceedings are void, though he might have taken cognizance of the same subjects under his general visitatorial power.⁵ A visitor may administer an oath, or require an

¹ Com. Dig. Visitor, C. ; *Murdock v. Phillips Academy*, 12 Pick. (Mass.) R. 266.

² *Murdock v. Phillips Academy*, 12 Pick. (Mass.) R. 262, 263, Shaw, C. J.

³ *Murdock's Appeal*, 7 Pick. (Mass.) R. 329, 330 ; and see *Garnett v. Ferland*, 6 B. & C. 611.

⁴ *Murdock's Appeal*, 7 Pick. (Mass.) R. 327, per Parker, C. J.

⁵ *Bentley v. the Bishop of Ely*, Fitz. 310 to 312 ; 1 Barnard, 192 ; *Fortes*.

answer upon oath ;¹ but he is not *obliged* to hear the appellant *personally*, or to receive parol evidence ; it is sufficient if he receives the grounds of the appeal, and the answer to it, in writing ; and this is the usual mode of proceeding.² Finally, he should always proceed, whether upon a general visitation, or a particular appeal, *summariè, simpliciter, et de plano sine strepitu aut figura judicii* ; for herein consists the whole excellence of his tribunal.³ A general visitor cannot have a mandamus to help him to visit his college, or to compel an inferior officer to do his duty ;⁴ but may suspend or deprive any for contumacy ; or who may refuse to acknowledge or submit to his visitatorial power ; since this is necessary to its exercise.⁵

§ 5. As the jurisdiction of the visitor is exclusive, it may, when the interposition of a court is sought in the affairs of the corporation, be extremely important to ascertain whether there be one or not. This question may sometimes be decided on affidavits ; but if a mandamus has been granted, commanding the party to whom it is directed, to admit a person to a fellowship, on an affidavit of his election, the court will not supersede the writ on affidavits, that there is a visitor, but will put the defendant to make a return ; because where the point is determined on affidavits against the party complaining, he has no opportunity to do himself justice in an action.⁶ If, in the return to a mandamus directed to a college, it be set forth, in general terms, that such a person is visitor, it is not necessary to specify his powers ; for as

296 ; 2 Stra. 912 ; 2 Kyd on Corp. 278. In the two latter books, it is said, the judgment was afterward reversed in the house of lords upon a writ of error.

¹ Ibid ; *Philips v. Bury*, 2 T. R. 348, 349.

² *The King v. the Bishop of Ely*, 5 T. R. 477, per Buller, J. ; 1 Blackst. R. 85 ; *Murdock's Appeal*, 7 Pick. (Mass.) R. 382, per Parker, C. J.

³ Com. Dig. Visitor, C. ; *The King v. the Bishop of Ely*, 1 Black. R. 82, per Lord Mansfield.

⁴ *Dr. Walker's case*, B. R. H. 212 ; Com. Dig. Visitor (Day's ed.) C. ; 2 Kyd on Corp. 281 to 284.

⁵ *Philips v. Bury*, 2 T. R. 349, 357, 358.

⁶ *Rex v. Whaley*, 2 Stra. 1139.

visitor, he has power to determine all matters, that come as grievances before him, unless he be particularly restrained by the statutes ; and such restraint will not be presumed.¹

But if there be one to whom the visitatorial power over a corporation is confided, it is his duty to exercise it upon all matters properly falling within his jurisdiction ; and, as we have seen, if an appeal is exhibited to him, and he will not take it, a mandamus lies to compel him to receive and hear it.² He will not, however, be obliged to go into the merits of the complaint ; but it is sufficient if he decides, that the appeal comes too late.³ Neither will a court grant a mandamus directed to one in such case, if it is doubtful whether he is visitor or not ;⁴ nor, if there be a visitor, will it interpose in a case coming within the general visitatorial power, if it appears that no application has been made to him ; for no court, whether of law or equity, can anticipate the judgment of the visitor, or take away his jurisdiction.⁵ When the existence of a visitor is not doubted, it frequently becomes a question, whether the person complaining, or the act of which the complaint is made, be within the visitor's jurisdiction ; and the determination of such questions belongs ultimately, in England, to the King's Courts, though the visitor may decide in the first instance.⁶ Upon subjects within his jurisdiction, the sentence of a visitor is final and conclusive ; nor, in England, can the King's

¹ *Case of All-souls*, Oxford, Skin. 13 ; 2 Show. 170 ; 2 Kyd on Corp. 239, 240.

² *Usher's Case*, 5 Mod. 452, no decision. *Dr. Walker's Case*, B. R. H. 212 ; and 2 Kyd on Corp. 279 ; *Rex v. Bishop of Ely*, 1 Wils. 266 ; 1 Black. R. 52, where it is considered doubtful ; *The King v. The Bishop of Lincoln*, 2 T. R. 338, n. a ; *The King v. The Bishop of Ely*, 2 T. R. 338 ; *The King v. The Bishop of Ely*, 5 T. R. 477 ; *The King v. The Bishop of Worcester, et al.* 4 M. & S. 415.

³ *The King v. the Bishop of Lincoln*, 2 T. R. 338, n. a.

⁴ *Rex v. Episcopum Eliensis*, 1 Wils. 266 ; S. C. 1 Black. R. 52 ; 2 T. R. 290, 345.

⁵ *Attorney General v. Talbot*, 3 Atk. 674, per Lord Hardwicke ; 2 Kyd on Corp. 239.

⁶ *Ex parte John Davison*, Esq. cited, Cowp. 319 ; 2 Kyd on Corp. 240, 241, 242, 243.

Court, in any form of proceeding, either directly or collaterally, review the sentence.¹ And it has been held, that where a visitor has actually executed a sentence of expulsion, though he may appear to have exceeded his jurisdiction, a mandamus will not lie to restore the party expelled; for that would be to command a visitor to reverse his own sentence.² But it is said, that in such case, the party, against whom the sentence has been executed, may have a remedy by ejectment,³ or an action for damages against the visitor.⁴ Though at common law, no appeal lies from the sentence of a visitor, this is sometimes given by the charter, or legislative act creating the corporation. Thus, from a decree of the visitors of the Theological Institution in Phillips Academy, in Andover, a limited appeal lies to the Supreme Court of Massachusetts, by force of a statute, which enables that Court to inquire, whether the visitors have exceeded the limits of their jurisdiction, or have acted contrary to the statutes of the founder, but not to go into a hearing *de novo* of the allegations and defence, or of the evidence adduced in support of either.⁵ But it was said that if, on such an appeal, it had been proved to the court, that the visitors had been partial or corrupt, the court would have annulled their sentence, as violating the statutes of the foundation, by which they were required to administer justice impartially, and exercise the functions of their office in the fear of God, according to the said statutes, the constitution of the seminary, and the laws of the land. But in such case, if

¹ Daniel Appleford's Case, 1 Mod. 82; Carth. 92, 93, cites 1 Mod. 82; 1 Lev. 23, 65; 2 Lev. 14; Raymd. 56, 94, 100; Sid. 94, 152, 346; Philips v. Bury, 2 T. R. 346; S. C. Skin. 447; S. C. 1 Ld. Raymd. 5; Ca. Parl. 45; Rex v. The Bishop of Ely, 2 T. R. 290; 1 Black. R. 85. Nor need the cause of a sentence of deprivation be disclosed in pleading. Philips v. Bury, 2 T. R. 353, 354; Kean's Case, 7 Co. 42; Rastal's Ent. fol. 1; Allen, Nash Jo. 393; Murdock's Appeal, 7 Pick. (Mass.) R. 322, per Parker, C. J.

² Brideoak's Case, H. 12, Anne, and cited in Rex v. the Bishop of Chester, 1 Wils. 209; S. C., 1 Black. R. 25, and in Rex v. the Bishop of Ely, 1 Black. R. 58; 2 Kyd on Corp. 281.

³ Per Lee, C. J., Rex v. the Bishop of Chester, 1 Wils. 209.

⁴ Green v. Rutherford, 1 Ves. 470.

⁵ Murdock Appellant, 7 Pick. (Mass.) R. 303.

the party arraigned before the visitors shall intend to impeach their judgment for partiality or corruption, he must seasonably demand that the evidence be reduced to writing, that it may come up authenticated by the presiding member of the board, and perhaps tender a bill of exceptions to the order or opinion of the board in matters of law to which he objects, so that from the entire want of evidence, or misapplication of it, the court might infer partially, or having a record of the opinion of the visitors as to a matter of law, be able to correct a palpable error in this respect.¹ Although it be a general rule, that the jurisdiction of a visitor is exclusive, so that no mandamus lies to compel the execution of any thing within it; yet that rule does not apply where the visitor is himself the party to do the act required; or, in other words, where the same person, who by one office is to do an act, is, in another right, also visitor.² If one who is no visitor attempt a visitation,³ or if a visitor exceed his authority, or intermeddle with a matter out of his jurisdiction, a writ of prohibition lies against him.⁴ But if no person, who claims the visitatorial power, applies to the Court, except one who has long exercised it, the Court will not grant a prohibition on the motion of a single fellow, who suggests that the right of visitation is in another.⁵

¹ *Murdock's Appeal*, 7 Pick. (Mass.) R. 325, 326, Parker, C. J.

² *Rex v. the Bishop of Chester*, 1 Barnard, 52; 2 Stra. 798; *Green v. Rutherford*, 1 Ves. 471; *The King v. the Bishop of Ely*, 1 Black. R. 86, per Lord Mansfield; *The King v. the Bishop of Ely*, 2 T. R. 338, 339, per Buller, J.

³ *Philips v. Bury*, 4 Mod. 110, cites Year Book, 6 H. 7, pl. 14; F. N. B. 41, 42; see 2 Roll. 230, l. 15, 27; Com. Dig. Visitor, D. & E.

⁴ *Bentley v. the Bishop of Ely*, Fitz. 108, 305, 310, 311; *Bishop of Ely v. Bentley*, 2 Bro. P. C. 220; 1 Barnard, 192; Fortes, 298; 2 Stra. 912; *Rex v. Bishop of Chester*, 1 Wils. 206, 209; S. C. 1 Black. R. 22, 25; *The King v. the Bishop of Ely*, 1 Black. R. 81, 82; *The Bishop of Chichester v. Harward and Webber*, 1 T. R. 650; Com. Dig. Visitor, D.; 2 Kyd on Corp. 277. Where the Court inclines to grant the motion for the prohibition, there the defendant has a sort of right to insist that the plaintiff shall declare in prohibition; but where the Court inclines against granting the motion, there the plaintiff has no such right to insist upon declaring. *Rex v. the Bishop of Ely*, 1 Black. R. 81, per Lord Mansfield.

⁵ And. 258; Com. Dig. Visitor, E. (Day's ed.)

In England, where no specific provision is made for the regulation and management of a charity, the Court of Chancery, by virtue of its general jurisdiction, takes cognizance of it, by information in the name of the attorney general, and since the statute of 43 Eliz. c. 4, by commission, in all cases within the general purview of the statute, and not coming within the exception of the proviso in it. But where there is a charter, giving proper powers, the charity must be regulated in the manner which the charter has pointed out; and where there is a local visitor, the Court of Chancery has no jurisdiction over any object within the cognizance of the visitor.¹ In New York, however, it seems settled, that the Court of Chancery can exercise no authority over an eleemosynary corporation, in a visitatorial character.² The persons entitled to execute the visitatorial functions, as the governors of schools, &c., have frequently the management of the revenues with which the charity is endowed; and in such cases, Courts of Chancery, by virtue of their general jurisdiction, will in England, and would undoubtedly in this country, compel them to account for their administration, in the same manner as other trustees.³ And in New York, though the Court of Chancery decided, that it could take no cognizance of an academic corporation in a visitatorial character, yet it also held, that it

¹ Attorney General *v.* Price, 3 Atk. 108; Attorney General *v.* Middleton, 2 Ves. 328, 329; Attorney General *v.* The Governors of Harrow School, 2 Ves. 551; Attorney General *v.* Bedford, 2 Ves. 505; and see Attorney General *v.* Dixie, 13 Ves. 519; *Ex parte* Berkhamstead School, 2 Ves. & Bea. 134; 2 Kyd on Corp. 182 to 187; but see Kirkby Ravensworth Hospital, 8 East, 221; S. C. 15 Ves. 305.

² The Auburn Academy *v.* Strong, 1 Hopkins, (N. Y.) Ch. R. 278; see Attorney General *v.* the Utica Ins. Co. 2 Johns. (N. Y.) Ch. R. 379.

³ Eden *v.* Foster, 2 P. Wms. 326; Attorney General *v.* Governors of Harrow School, 2 Ves. 551; Attorney General *v.* The Governors of the Foundling Hospital, 2 Ves. jr. 42; S. C. 4 Bro. C. C. 167; *Ex parte* Berkhamstead Free School, 2 Ves. & Bea. 134; Attorney General *v.* Dixie, 13 Ves. 519; Attorney General *v.* Corp. of Bedford, 2 Ves. 505; Attorney General *v.* Lubbock, 1 Coop. Ch. C. 15; Attorney General *v.* York Archbishop, 2 Russ. & Mylne, 461; Sanderson *v.* White, 18 Pick. (Mass.) R. 339, Shaw, C. J.

might take cognizance of a cause in which the academy on one side, and the teacher on the other, were parties upon some ground of its proper jurisdiction, as its power to cause contracts to be delivered up and cancelled.¹ In England, too, the Court of Chancery, though it exercises no control over persons entrusted merely with the regulation of the charity, carries its interference so far that, where these persons have the management of the estate, it makes the corporations themselves amenable to it for a breach of the trust.²

§ 6. Where no visitor has been appointed by the founder, and his heirs are extinct, it has been made a question, in England, whether the visitatorial power devolves personally on the king, or belongs to the Court of King's Bench, by virtue of its general superintending authority. On an application to the Court of King's Bench, in the time of Lord Chief Justice Holt, the latter is reported to have said, "I take this to be altogether a lay corporation, and then the visitation belongs to the founder and his heirs; and if he die without heirs, I take the visitation goes to the king; and this is my private opinion."³ And he cites in support of this opinion a case from the Year Books.⁴ The same question coming incidentally before Lord Mansfield, in case of a college, his Lordship considered, that as "the foundation was not a charity, the power of superintending it did not go to the king as visitor;" but that "the right devolved to the crown to be exercised by the Court of King's Bench;"⁵ and he founded himself upon the case of *Rex v. the Bishop of Chester*,⁶

¹ *The Auburn Academy v. Strong*, 1 Hopkins, (N. Y.) Ch. R. 278; and see *Sanderson v. White*, 18 Pick. (Mass.) R. 339.

² *Lydiat v. Foach*, 2 Vern. 412; *Mayor of Coventry v. Attorney General*, 2 Bro. P. C. 235; *Attorney General v. Corporation of Bedford*, 2 Ves. 505; *Ex parte Greenhouse*, 1 Madd. R. 92; *Attorney General v. Skinner's Company*, 5 Madd. R. 173.

³ Anon. 12 Mod. 232.

⁴ *Simon de Monford's Case*, 5 Ed. 4 long. quint. 123.

⁵ *Rex v. Gregory*, 4 T. R. 240, 241, in notes.

⁶ 2 Stra. 797.

where it was held, that during the suspension of the visitatorial power, it was the same as if there had been no visitor ; and the king, in Court of King's Bench, proceeded by mandamus upon that ground. It is now, however, well settled in England, that if there be no person who can act as visitor over a private foundation, in consequence of a failure of the founder's heirs,¹ or their incapacity, as from lunacy,² the duties of that office devolve upon the king ; which it then becomes the task of the Court of Chancery to execute for his majesty,³ in the same manner as if it had been a mere royal foundation.⁴ The mode of proceeding, in such case, is neither by bill nor information, but by petition to the Lord Chancellor, as keeper of the great seal, in his visitatorial capacity.⁵

¹ *Rex v. the Master, &c. of St. Catherine's Hall, Cambridge*, 4 T. R. 233 ; *Ex parte Wrangham*, 2 Ves. jr. 609 ; *Attorney General v. Black*, 11 Ves. 191 ; *Attorney General v. The Earl of Clarendon*, 17 Ves. 491.

² *Attorney General v. Dixie*, 13 Ves. 519.

³ *Attorney General v. Price*, 3 Atk. 109.

⁴ The case of *Queen's College, Camb.* 1 Jac. R. 1.

⁵ *The Attorney General v. Dixie*, 13 Ves. 527, 534, 535 ; *The Attorney General v. The Earl of Clarendon*, 17 Ves. 498, 499 ; *Ex parte Wrangham*, 2 Ves. jr. 609 ; *Attorney General v. Black*, 11 Ves. 191.

CHAPTER XX.

OF THE WRIT OF MANDAMUS.

§ 1. One of the modes in which Courts exercise common law jurisdiction over civil corporations, for the purpose of compelling them to observe the ordinances of their constitution, and to respect the rights of those entitled to participate in their privileges, is, as we have remarked in the preceding chapter, by writ of mandamus. We propose therefore to treat of this writ, so far as it is applicable to civil corporations aggregate of a private nature; and in doing so shall be compelled to illustrate its nature, and the mode of proceeding under it, principally, by a reference to cases concerning public corporations.

The writ of mandamus is substantially a command in the name of the sovereign power, directed to persons, corporations, or inferior courts of judicature within its jurisdiction, requiring them to do a certain specific act, as being the legal duty of their office, character, or situation; and, in the specific relief it affords, resembles a bill in chancery. In England, it is termed a prerogative writ, in distinction from a writ of right; issuing exclusively from, and granted at the discretion of the Court of King's Bench.¹ From its high and controlling nature, it runs in that country into exclusive jurisdictions, as the palatinates, the city of London, the cinque ports, and ancient towns, notwithstanding their exclusive privileges, in the same manner as a writ of habeas corpus.² In our own country, it is issuable, in general, by the highest Courts

¹ *Awdley v. Joy*, Poph. 176; *Rex v. Commissioners of Excise*, 2 T. R. 385, per Ashurst, J.; *Rex v. Winchelsea*, 2 Lev. 86. It seems that anciently the Court of Chancery exercised the power of issuing writs of mandamus to inferior courts, though not to the King's Bench. *The Riotor's Case*, 1 Vern. R. 175.

² *Rex v. Commissioners of Excise*, 2 T. R. 385; *Rex v. Winchelsea*, 2 Lev. 86.

of ordinary jurisdiction in the several States ; Courts of Error never issuing this writ. By "*ordinary*" we do not of course mean "*original*" jurisdiction ; and in Pennsylvania, though a statute of that State provides, that the Supreme Court shall have no original jurisdiction in *civil cases*, this does not deprive that court of the power of issuing a mandamus.¹ Neither does an act prohibiting a court from trying issues of fact in bank, prevent it from issuing a mandamus ; for, at common law, the return to a mandamus must be received as true, until it is proved to be false in an action for a false return, which may be brought in some other court.² The Circuit Courts of the United States may also issue writs of mandamus ; but their power in this particular is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.³ And on error to the Circuit Court for the District of Columbia, it was determined by the Supreme Court of the United States, that a writ of error would lie under the act relating to the District of Columbia, which is similar in its provisions to the judiciary act of 1789, c. 20, sec. 22, to reverse the judgment of the Circuit Court, awarding a peremptory mandamus, to admit the defendants in error to the offices of directors in the Columbian Insurance Company, where the matter in controversy amounted to one thousand dollars. The value of an office, it was held, must be ascertained by the salary.⁴

§ 2. As the writ of mandamus is not a writ of right, it is not granted, of course, but only at the discretion of the court to whom the application for it is made ; and this discretion will not be exercised in favor of the applicant, unless some just or useful

¹ Commonwealth v. Commissioners of Lancaster, 6 Binn. (Penn.) R. 5.

² Ibid. In Pennsylvania the practice is not to issue writs of mandamus, except from the court which sits in the district in which the persons reside, to whom the mandamus is to be directed. Commonwealth v. Clark, 9 Serg. & Rawle, (Penn.) R. 62.

³ McIntire v. Wood, 7 Cranch, 504 ; McClung v. Silliman, 6 Wheat. R. 596 ; Smith v. Jackson, 1 Paine, C. C. R. 453.

⁴ Columbian Ins. Co. v. Wheelwright, 7 Wheat. R. 534.

purpose may be answered by the writ.¹ The motion for it must be founded on affidavits drawn up in so certain and formal a manner, that an indictment for perjury may be sustained upon them, if the averments be wilfully false.² If the corporation is by prescription, its constitution, as well as the applicant's right, must be proved by affidavit; if by charter, a copy of the charter must be produced at the time of making the motion.³ In England, if the affidavits be sworn in court, or before a judge at chambers, they need not be entitled in the King's Bench. But if sworn before a commissioner, they must be entitled of the court, unless they say "before A. B., commissioner of the Court of King's Bench."⁴ Strictly speaking, the affidavits should not be entitled with the names of any parties; for there is at the time no cause pending before the court. In the Court of King's Bench, the practice seems to have varied upon this point,⁵ until settled by a rule of court.⁶ In New York, a motion for a mandamus, grounded upon affidavits thus entitled, was denied; for it was said by the court, that an indictment for perjury in making such an affidavit must fail, as it could not be shown that the cause of which the affidavit was entitled, existed in the court, when the affidavit was made.⁷ Where, however, an affidavit was entitled "Sup. Court in the matter of J. L. v. the Judges, &c.," it was permitted to be read; upon the ground that it was not entitled as of a case pending in court, and did not therefore fall within the spirit of the rule.⁸

¹ *Rex v. Commissioners of Excise*, 2 T. R. 385; *Corporation v. Paulding*, 4 Mart. (La.) R. (N. S.) 189; *Van Rensselaer v. Sheriff of Albany*, 1 Cowen, (N. Y.) R. 501.

² *Rex v. Chester*, 1 T. R. 403; *Rex v. London*, 1 T. R. 425; *Rex v. Ely*, 2 T. R. 336; *Anon.* 2 Barnard, 237.

³ *Bul. N. P.* 200; *Selw. N. P.* 1076.

⁴ *Rex v. Hare*, 13 East, 189. The entitling the affidavit of the court in which it was sworn will not vitiate it. *Ex parte La Farge*, 6 Cowen, (N. Y.) R. 61.

⁵ *Rex v. Lewis*, 1 Stra. 704; *Rex v. Jones*, 1 Stra. 704, 705; *Rex v. Pier-son*, Andr. 313; *Bevan v. Bevan*, 3 T. R. 601; *Rex v. Harrison*, 6 T. R. 60; *King, qui tam v. Cole*, 6 T. R. 640; *Clarke v. Cawthorne*, 7 T. R. 331.

⁶ 7 T. R. 454.

⁷ *Haight v. Turner*, 2 Johns. (N. Y.) R. 371, 372, 373.

⁸ *Ex parte La Farge*, 6 Cowen, (N. Y.) R. 61.

When an application is made for a mandamus, and the question is one which the parties litigant are desirous of having tried, the court will grant the writ for that purpose, or they will direct an issue to be tried. But in such cases, a foundation must be laid before them, and they must see that there is some ground for the application. The writ will not be granted merely for asking.¹ Before proceeding to hear the parties on a motion for a mandamus to a board of examiners, to compel them to give a certificate of election to a county commissioner, another having on a new election been elected to his place, the Supreme Court of Massachusetts ordered notice of the application first to be given to the incumbent.²

§ 3. Previous to the time of Lord Mansfield, the principles, upon which the writ of mandamus ought to be granted, do not appear to have been well settled or understood; and from an attention to the letter of former precedents, rather than to the nature of this useful remedy, it would seem that the earlier judges sometimes denied it, where, at the present day, it would undoubtedly be granted. The great judge, whom we have just mentioned, indeed, tells us, that, at his time, *within the last century*, it had been liberally interposed for the benefit of the subject, and the advancement of justice. The original nature of the writ, says he, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and a defect of police. Therefore it ought to be used upon all occasions, where the law has established no specific remedy, and where in justice and good government there *ought* to be one. The value of the matter, *or the degree of its importance to the public police*, is not scrupulously weighed. If there be a *right*, and *no other* specific remedy, *this* should not be denied.³

1. Accordingly in case of public corporations, it has been de-

¹ Per Lord Mansfield, 1 T. R. 333, 334.

² Strong v. Petitioner, &c., 20 Pick. (Mass.) R. 484.

³ Rex v. Barker and another, 3 Burr. 1267; The King v. The Commissioners of the land tax in St. Martin in the Fields, 1 T. R. 148, 149.

cided that a mandamus lies to compel them to proceed to the election of a new mayor, at any time after the charter day has passed without such election, where the former mayor, having power to do so, holds over, and refuses to convoke an assembly for that purpose ; unless indeed the charter restrain the right of electing to a particular time ;¹ to compel a new election of a mayor, where the re-election of the former mayor was void ;² to compel the corporation to proceed to an election of members to supply vacancies in a *definite* integral class, after a reasonable time has expired from the period of their occurrence, during which they have neglected to fill them up ; nor is it an objection to the granting of the writ, that at the time of application for it, an information in the nature of a *quo warranto* is pending against the mayor and corporators, to whom it is directed.³ It will also be granted to compel the corporation to proceed to the election of one out of two persons put in nomination for an office, when the course of proceeding is for one class of the corporation to nominate two persons, of whom another class is to elect one into office.⁴ And though the officers be annual ministerial officers, as mace bearers, yet if public ministers, and necessary in the execution of the judicial functions of the corporation, and not mere servants, a mandamus lies to the corporation to compel it to elect them.⁵ A mandamus, however, will not be granted to compel a corporation to supply vacancies in an indefinite class, if sufficient remain out of whom to elect members for the definite class ; since this would be lessening their chance of being elected into the definite class. In such case, the application ought first to be, to compel the corporation to fill up the vacancies in the definite body ; and afterwards, to prevent a dissolution of the corporation, the court would perhaps grant a mandamus to elect a sufficient number into the indefinite class, although it may be very difficult to point out

¹ *Rex v. Cambridge*, 4 Burr. 2011 ; *Rex v. Gregory*, 8 Mod. 113, 127.

² *Reg. v. Pembroke Corp.* 8 Dowl. (P. C.) 302.

³ *Anon.* 2 Barnard, 236 ; *Rex v. Grampound*, 6 T. R. 302 ; *Rex v. Fowey*, 2 Barn. & Cresw. 596 ; S. C. 4 D. & R. 139.

⁴ *Rex v. Abingdon*, 1 Lord Raym. 561 ; *Rex v. Ely*, 2 T. R. 334.

⁵ *Rex v. St. Martin*, 1 T. R. 149 ; *Rex v. Liverpool*, 1 Barnard, 83.

how many are to be elected, which is a strong argument against granting the writ.¹ It has also been resolved, that a mandamus would lie to compel a dean and chapter to fill up a vacancy among the canons residentiary; and that on such a mandamus the court would compel the election at the peril of those who resisted.² We see no reason why the same remedy should not lie against a private corporation aggregate, to enforce an obedience on the part of the members to the charter, or act of incorporation under which they act, if they neglect or refuse to elect their proper officers. In the case of *Rex v. The Bishop of Ely*,³ the Court of King's Bench awarded a mandamus against the bishop, commanding him to appoint as master one of two fellows presented to him by the fellows of a college; holding that he enjoyed this power of appointment not in virtue of his visitatorial capacity, but by the special appointment of the founder. And in *The King v. The Master and Fellows of St. Catharine's Hall*,⁴ which was an application for a mandamus to a college, commanding them to declare a fellowship vacant, and to proceed to the election of another fellow, though the Court of King's Bench disclaimed jurisdiction over the particular case, as being in the King in Chancery, yet no objection was taken that mandamus could not lie, to compel an election in case of a private corporation.

2. In case of a public corporation, it has been decided, that if a corporator duly elected refuse or neglect to take upon himself the execution of his office, a mandamus will issue to compel him to do so; though the defendant may either show for cause upon the rule, or plead to the writ any sufficient excuse for not accepting the office.⁵

3. Numerous cases are found in the books, from which it appears that mandamus lies, to admit one elected to an office in a corporation, to the legal possession of his right. The writ, how-

¹ *Rex v. Fowey*, 2 B. & C. 590, 593; S. C. 4 D. & R. 139.

² *Bishop of Chichester v. Harward & Webber*, 1 T. R. 650.

³ 2 T. R. 290.

⁴ 4 T. R. 233, 243, 244, 245.

⁵ *Rex v. Merchant Taylors*, 2 Lev. 200; *Rex v. Bedford*, 1 East, 80; *Rex v. Brown & Rex v. Leyland*, 3 M. & S. 186, 188.

ever, confers no title upon the person admitted, its sole operation being to put him in a situation to enforce his former title, if sufficient in law. For the sake of preserving peace in corporations, it will not be granted, unless the applicant show a *prima facie* title. Thus, it lies to compel the proper officers to admit to the possession of his office or place, one elected to be mayor, bailiff, or other officer, an alderman, jurat, capital, or other burgess; one of the approved men, or one of the eight men, if the affidavits show that approved-men, or eight-men, are a class of corporate officers; a high steward, a common-councilman, recorder, a town clerk, a steward of a court leet, an attorney of the court of a liberty; a livery man of a company being a member of a municipal corporation; a sword bearer, if an officer of justice; a serjeant, a constable, a bailiff, though a ministerial officer, or even a common freeman.¹ It will lie also to compel the proper officers to admit to the freedom of a corporation any of that class of persons, who are possessed of an incorporate right according to the regulations of the constitution, such as apprentices who have served their time; and to take all such steps as may be necessary, preparatory to their admission.² This writ has also been granted to compel an Insurance Company to swear in a director, the company having been created by charter from the crown;³ to restore di-

¹ 2 Rol. Abr. Rest, p. 4, 8, 7; Steven's Case, T. Ray. 431; Shuttleworth v. Lincoln, 2 Bulst. 122; Rex v. Canterbury, 1 Lev. 119; Taylor's Case, Poph. 133; Braithwaite's Case, Vent. 19; Anon. 1 Lev. 148; Rex v. Wilton, 5 Mod. 257; Clerk's Case, Cro. Jac. 506; Parker's Case, 1 Vent. 331; Rex v. Tidderley, Sid. 14; Guildford Case, T. Ray. 152; Roe's Case, Comb. 145; London v. Estwick, Sty. 32; Bret's Case, Comb. 214; Rex v. Wells, 4 Burr. 1999; Anon. Dyer 332, b. n.; Taverner's Case, T. Ray. 446; Middleton's Case, 1 Sid. 169; Milward v. Thatcher, 2 T. R. 87; Stamp's Case, T. Ray. 12; Baxter's Case, Sty. 355; Audley v. Joyce, Poph. 176; S. C. Noy, 78; Dighton, 1 Vent. 78, 82; Rex v. Campion, 1 Sid. 14; Baxter's Case, Sty. 457; Hurst's Case, 1 Lev. 75; S. C. 1 Sid. 94, 152; Anon. & Rex v. Westminster, Comb. 244; Rol. Abr. 456.

² Townsend's Case, T. Ray. 69; S. C. 1 Lev. 91; S. C. 1 Sid. 107; Green v. Durham, 1 Burr. 131; Clithero Case, Comb. 239; Rex v. Ludlam, 8 Mod. 270; Wannel v. London, 1 Stra. 675; Rex v. Harrison, 3 Burr. 1328; S. C. 1 W. Black. 372.

³ Anon. 1 Stra. 696.

rectors of a banking corporation, who were refused the exercise of their rights as directors by a majority of the board,¹ or a member of a navigation company who was disfranchised without notice or opportunity of defence ;² to compel the trustees of a meeting house to admit a dissenting minister who was duly elected,³ and trading companies to admit as members those entitled to become such.⁴ It will not, however, lie to the benchers of one of the inns of court, to compel them to admit an individual a member of the society, with a view to his qualifying himself to be called to the bar ;⁵ nor will it lie to compel the benchers to call to the bar a member of the society, who has complied with all the usual requisites, such as paying the dues, and performing the exercises.⁶ The original institution of the Inns of Court, says Lord Mansfield, nowhere precisely appears ; but it is certain, that they are not corporations, and have no constitution by charters from the crown. They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning admission to the bar is delegated to them by the judges, and, in every instance, their conduct is subject to the control of the judges as visitors. The ancient and usual way of redress is by appeal to the judges.⁷ Where a statute provided that any subject desiring admission to a particular company should, on request made for that purpose by himself or any other person to the governor or deputy governor of the company, be admitted a member on payment of a certain sum, for the use of the company, and taking the oath prescribed by the statute ; it

¹ *Prieur & Labutat v. President, &c. Com. Bank*, 7 Louisiana R. 509.

² *Delacy v. Neuse River Nav. Co.*, 1 Hawk. (N. C.) R. 274.

³ *Rex v. Barker et al.*, 3 Burr. 1265.

⁴ *Da Costa and the Russia Company*, 2 Stra. 783 ; *Rex v. March*, 2 Burr. 999.

⁵ *The King v. The Benchers of Lincoln's Inn*, 4 B. & C. 855. The court considered, that it had no authority to interfere with the Society of Barnard's Inn, and refused a mandamus to compel them to admit an attorney into the society. *Rex v. Barnard's Inn*, 5 Adolph. & Ellis, (K. B.) 17.

⁶ *The King v. Gray's Inn*, 1 Doug. 353 ; and see *Sti.* 467 ; *Ray*, 69 ; *Mar.* 177.

⁷ *The King v. Gray's Inn*, 1 Doug. 354, 355.

was held, that a mandamus lies to compel the governor or deputy governor to admit any person desiring it, and tendering the sum, and offering to take the oath.¹ Although a mandamus will not be granted to admit a deputy on the application of the *deputy* himself,² it will be on the application of the principal, if he be empowered to appoint a deputy.³ If the charter has not empowered him to appoint a deputy, but the corporation have subsequently imposed new duties upon him, to be performed in person or by deputy, the writ will not be granted to admit his deputy to the place of deputy, generally, but perhaps to the discharge of those particular duties subsequently imposed. Unless, therefore, the constitution has declared the deputy to be a corporate officer, the mandamus must not be to admit and swear in the deputy as a member of the corporation, but merely to the discharge of his delegated office.⁴ On an application for a mandamus to compel admission to an office, the affidavits must show the nature of the office, unless it be one judicially noticed by the court, as that of mayor, &c. ; in order, that the court may know, that the office is of such a nature that a mandamus will lie to compel admission to it.⁵ The affidavits must also show the mode of election, or the corporate regulations for admission, the preliminary conditions,⁶ the applicant's title by election, or the acquisition of an inchoate right to admission, his performance of the conditions, that he has made due application to the proper officer to admit him, and been rejected.⁷ It must also appear, that he has complied with

¹ B. R. H. 261 ; 2 Kyd on Corp. 303.

² *Rex v. President des. Marches*, 1 Lev. 306.

³ *Rex v. Clapham*, 1 Vent. 111 ; *Rex v. Ward*, 2 Str. 897 ; *Rex v. St. Albans*, 12 East, 559, n. ; *Rex v. Gravesend*, 2 B. & C. 604 ; S. C. 4 D. & R. 117 ; *Jones v. Williams*, 5 D. & R. 660.

⁴ *Ibid.*

⁵ *Anon.* 2 Mod. 316 ; *Rex v. Guildford*, 1 Lev. 162 ; S. C. T. Ray, 152.

⁶ *Rex v. Newling*, 3 T. R. 310 ; *More v. Hastings*, C. T. H. 353, 362.

⁷ *Moore v. Hastings*, C. T. H. 353, 363 ; *Rex v. West Looe*, 3 B. & C. 686. "If there is a fine payable, it is necessary to show a tender of it ; but if it be said, that there is a reasonable *fine* payable by custom, and it has been usual to receive a certain sum, it is sufficient, without showing the amount ; and it is sufficient also to allege a tender of a reasonable fine,

any statute requisitions, necessary to his admission to the office.¹ Though a mandamus to admit gives no title, yet it will not be granted, when there is an officer *de facto*, though that officer be in under a peremptory mandamus obtained by collusion, and claim under the same election with the applicant ; for the remedy is to try the title of the officer *de facto* on an information in the nature of a *quo warranto*, on which if judgment of ouster go against the defendant, a mandamus may be granted with less inconveniency to the corporation ; nor will it be granted to admit to office the candidate therefor, on account of improper votes having been received for one who was declared elected, had accepted the office, and made the requisite declaration.² But though the office be full, if *quo warranto* does not lie, a mandamus will be granted ; otherwise, in many cases, the applicant would be without remedy.³ Where one had been previously admitted to a corporate office under a peremptory mandamus, the court refused the writ to another applicant who claimed to have been duly elected. The person admitted under the peremptory mandamus was considered the officer, until the matter had been tried by an action.⁴ A mandamus to admit will not be granted to an applicant elected contrary to an usage, that the same person shall not be elected to the office for more than two years in succession ; and though there be evidence in explanation, if there be none in contradiction of the usage, the court will summarily determine upon it without sending the question to a

without stating the amount ; for a reasonable fine does not imply a fine uncertain, or any discretion in the officer to vary the amount, or dispute the reasonableness of the usual payment ; it is only necessary, that the court should perceive that the officer has been previously called upon to do his duty, and that the applicant is in no default. Willcock on Mun. Corp. 372, 373, part, 2, tit. 85 ; Moore v. Hastings, C. T. H. 353, 362.

¹ Crawford v. Powell, 2 Burr. 1016 ; Rex v. Monday, Cowp. 539, 540 ; Rex v. Hawkins, 10 East, 216 ; Rex v. Parry & Phillips, 14 East, 561.

² Rex v. Winchester, 2 Nev. & P. (C. B.) 274.

³ Rex v. Barker, 3 Burr. 1265 ; Rex v. Colchester, 2 T. R. 260 ; Rex v. Thatcher, 1 D. & R. 427 ; People v. The Corporation of N. Y., 3 Johns. (N. Y.) Cas. 79.

⁴ Rex v. Turner, T. Jones, 215.

jury.¹ Where an application is made for a writ to swear, or admit, the court will, in case the right appear plain, grant the writ upon the first motion, otherwise the rule will only be granted nisi.²

4. Where a public statute requires all persons in possession of corporate offices to take a particular oath, under penalty of being displaced, a mandamus may be directed to an eleemosynary corporation, commanding it to remove certain persons from their offices, for a non-compliance with the statute.³ In this case, says Mr. Kyd, a *quo warranto* would not have lain, because the college was an eleemosynary foundation; but it would lie in case of corporation officers who should neglect, &c., and therefore a mandamus would not be the proper remedy.⁴

5. The writ of mandamus, when employed to restore officers illegally displaced, was anciently termed "a writ of restitution;" and the title "mandamus" is not found in the older abridgments. The ancient writ appears to have been confined exclusively to offices of a public nature;⁵ but in modern times, the writ of mandamus, as we have before remarked, lies wherever there is a *right*, and *no other* specific remedy to enforce it. In general, it will be granted to restore, wherever it would be granted to admit a member or officer of a corporation. If a corporator has been unjustly or irregularly removed, or suspended from his office, or disfranchised, the court will grant a mandamus to restore him.⁶ The old rule appears to have been, that a mandamus will lie to compel an admission or restoration to no place or office, unless it have some relation to the public; and upon this ground, an application for one to be directed to a company of gunmakers, commanding them to restore an approver of guns, who had been deprived of his place, was rejected.⁷ So, too, because his

¹ *Rex v. London*, 1 T. R. 426.

² B. N. P. 199; *Rex v. Jotham*, 3 T. R. 377.

³ *Rex v. St. John's College*, Skin. 549; S. C. 3 Salk. 230.

⁴ 2 Kyd on Corp. 337, n. a.

⁵ 2 Sel. N. P. (Wheat's ed.) 817.

⁶ See cases cited ante, page 562.

⁷ *Vaughn v. Company of Gunmakers in London*, 6 Mod. 82.

office was not of a public nature, the court refused a mandamus to restore a surgeon to an hospital.¹ Partly upon the same ground, a mandamus was refused in Lord Holt's time, to restore a man to the office of clerk of a butcher's company ;² though it was afterwards granted upon the ground, that the case was the same with that of a town clerk, in which a mandamus had often been granted.³ In the time of Lord Mansfield, however, a more liberal doctrine was established ; and the value of the matter, or the degree of its importance to the public police, was not scrupulously weighed.⁴ An assize lay for a tenant of an office, in fee, in tail, or for life ; against the tenant of a freehold, or against the tenant and the disseisor, where the office was one of profit, and not of mere charge.⁵ Upon the ground that an assize was another specific remedy, a mandamus was formerly refused, where the assize would lie.⁶ The remedy by assize, says Mr. Kyd, has now become obsolete, and therefore, the question, whether it will lie, never makes any part of the consideration, whether a mandamus ought to be granted or not.⁷ The nature of the interest, which the possessor of a place or office has in it, seems now the principal question to be considered on an application for a mandamus, either for admission or restoration.⁸ It would not lie to restore an officer at the will of the corporation, unless it is said, he is turned out by others than the corporation.⁹ Mr. Willcock justly remarks upon this case, that he does not know how he could be turned out by others ; for their attempt could not amount to an amotion, but a mere preclusion and dis-

¹ Comb. 41.

² White's Case, 6 Mod. 18 ; S. C. 3 Salk. 232.

³ White's Case, 2 Ld. Raymd. 959, 1004.

⁴ Per Lord Mansfield, *Rex v. Barker* and another, 3 Burr. 1267.

⁵ John Webb's Case, 8 Co. 47 ; 2 Inst. 312 ; F. N. B. 177 ; Com. Dig. Assize, B. 2, 3, 4, 5, 6 ; B. R. H. 100.

⁶ White's Case, 6 Mod. 18 ; and see Comb. 244 ; 1 T. R. 404 ; Comb. 347, 348.

⁷ 2 Kyd on Corp. 320 ; White's Case, 2 Ld. Raymd. 959, 1004.

⁸ 2 Kyd on Corp. 320.

⁹ Anon. 1 Barnard, 195 ; and see 1 Sid. 15.

turbance in the exercise of his right.¹ In *Rex v. Slatford*,² it was resolved, that where a man was elected to hold at will, he may be removed at pleasure, without cause shown ;³ yet, that if it did not appear that the corporation had declared their will to remove him, the court might grant him restitution. A query is made in the case, whether a removal by the corporation is not a declaration of their will. A mandamus has been granted to restore a clerk to a butcher's company,⁴ a clerk to a company of masons, a treasurer to the governors of the new water-works,⁵ a clerk or surveyor of the city works,⁶ a town clerk, a common clerk of a vill, a parish clerk, a sexton, and a scavenger.⁷ In England, it has been decided, that it lies to restore the school master of a grammar school founded by the crown,⁸ or the minister of an endowed dissenting meeting house ;⁹ and in our own country, to restore a trustee of a private academic corporation, though no emoluments were attached to his office.¹⁰ Here too, the remedy has been applied to restore a member and trustee of a religious corporation,¹¹ and in several cases, to restore the members of private corporations for charitable purposes,¹² illegally expelled. It seems too, that a suspension from office warrants

¹ Willcock on Mun. Corp. 378.

² Comb. 419.

³ See *Dighton's Case*, Sid. 461 ; S. C. 1 Vent. 77, 82.

⁴ *White's Case*, 2 Ld. Raymd. 1004.

⁵ *Rex v. Governors of Water Works*, 1 Lev. 123 ; S. C. 2 Sid. 112 ; *Middleton's Case*, 1 Sid. 169.

⁶ *Rex v. Mayor, &c. of London*, 2 T. R. 182, n.

⁷ 1 Vent. 143, 153 ; *Rex v. Slatford*, Comb. 419 ; Sty. 458 ; *Rex v. Guardians of Thame in Com. Oxon.* 1 Stra. 115 ; *Rex v. Barker and another*, 3 Burr. 1267, per Lord Mansfield ; 2 Kyd on Corp. 320.

⁸ *Rex v. Ballivos de Morpeth*, 1 Stra. 58.

⁹ *Rex v. Barker and another*, 3 Burr. 1265 ; S. C. 1 Black. R. 300, 352 ; *Rex v. Jotham*, 3 T. R. 575.

¹⁰ *Fuller v. Plainfield Academic School*, 6 Conn. R. 533.

¹¹ *Green v. the African Methodist Episcopal Society*, 1 Serg. & Rawle, (Penn.) R. 254.

¹² *Commonwealth v. S. Patrick Benevolent Society*, 2 Binn. (Penn.) R. 448 ; *Commonwealth v. the Philanthropic Society*, 5 Binn. (Penn.) R. 486 ; *Commonwealth v. The Pennsylvania Beneficial Institution*, 2 S. & R. (Penn.) R. 141.

the granting of this writ, as well as a removal; for a suspension is a temporary amotion, and otherwise, it is said, under pretence of repeated suspensions, an officer might be entirely excluded from the advantage of his situation.¹ And the writ has been granted to restore a member of an university, who has been improperly suspended of his degrees.² As in case of admission, so it will be granted to restore a deputy on the application of his principal, though not on the application of the deputy himself.³ The modern decisions upon this subject seem indeed to be made in the spirit of Lord Mansfield's rule, that wherever there is a *right*, and no other specific remedy, this will not be refused. Where it appears from the showing of an officer, that he has been justly though irregularly removed,⁴ or in case of a financial officer for life, or *quamdiu bene se gesserit*, who is suspended until he has submitted his accounts to the proper officer, and paid over the balance due, that he has refused to do so, and been guilty of contumacy and improper conduct towards those whose officer he is, a mandamus to restore, it has been decided, will not be granted.⁵ Neither will the writ be granted to restore one who has been ousted in *quo warranto*, or who has resigned his office; since judgment in *quo warranto* is conclusive against the defendant, whether on the writ or on the information; and after a resignation has been accepted, the corporator cannot resume his office.⁶ And where A. was removed, and B. elected in his place, afterwards A. restored by mandamus, and subsequently his office became vacant; upon the application of B. for a mandamus without a new election, the writ was refused; for A. was a legal

¹ *Rex v. Guilford*, 1 Lev. 162; S. C. T. Ray. 152; *Rex v. London*, 2 T. R. 182; *Rex v. Whitstable*, 7 East, 355, and n.; Willcock on Mun. Corp. 379.

² *Rex v. University of Cambridge*, T. 19, G. 3; *Dr. Ewin's Case*, 2 Sel. N. P. (Wheat's ed.) 824.

³ *Rex v. President des Marches*, 1 Lev. 306.

⁴ *Rex v. Axbridge*, Cowp. 523; *Rex v. Bristol, Mayor*, 1 D. & R. 389; S. C. 5 B. & A. 731; *Rex v. Bank of England*, 2 B. & A. 620.

⁵ *Rex v. London*, 2 T. R. 182.

⁶ *Rex v. Tiddlerley*, 1 Sid. 14; *Rex v. Campion*, Ib.

officer at the time of B's. election, so that B. never acquired any title to the office.¹ It is, however, no objection to the granting of a mandamus to restore, that another has been elected to the office, since the motion of the applicant. In such case, the court will grant leave to file an information in the nature of a *quo warranto* against the person so elected, at the same time that they award the mandamus.² A party, whose right to an office has been established by verdict, cannot have a peremptory mandamus to restore him, until he has signed a judgment in the action.³

In the case of *Howard v. Gage*,⁴ which was an application for a mandamus to restore an annual officer, it appearing, that the validity of the election was disputed upon the facts, the Supreme Court of Massachusetts refused the writ, upon the ground, that the statute of Anne not having been adopted in that State, the verdict in the action for a false return would not be found, until after the expiration of the year for which the party complaining was chosen. "The cases," say the court, "in which the writ of mandamus may be an adequate remedy, in admitting or restoring to office, seem to be where the office is holden for a longer term than a year, or, where the return to the writ will involve merely a question of law, so that admitting the facts to be true, a peremptory mandamus ought to go."⁵ We find nowhere else a refusal of the writ upon this ground. The course in England has probably been, to grant the writ of mandamus, and if the facts stated in the return are false, to leave the applicant to his remedy in damages on his action for a false return. On application for a mandamus to restore, it is unnecessary for the prosecutor to state, that he was once in the office, since if this was not the case, it may be shown by the opposite party.⁶ As a mandamus to admit or

¹ *Shuttleworth v. Lincoln*, 2 Bulstr. 122.

² *Rex v. Bedford Level*, 6 East, 360; *Shuttleworth v. Lincoln*, 2 Bulstr. 122.

³ *Neale v. Bowles*, 1 Har. & Woll. 370.

⁴ 6 Mass. R. 462.

⁵ *Ibid.* 464.

⁶ *Rex v. Cutlers*, C. T. H. 129.

swear in is merely to enable a party to assert his right, whereas a mandamus to restore places a party in full possession of his office ; a distinction is made between the two cases, in the granting of the writ. In the former, if the right appear plain, the court will grant the writ upon the first motion ; whereas, in the latter, however plain the applicant's right may appear, they will first grant a rule to show cause why such a writ should not issue.¹

6. The writ of mandamus lies too, to compel a corporation or its officers to do many other acts which, by general law, or by virtue of official station, they are bound to do, which the party prosecuting the writ has a right to have done, and for which there is no other adequate, specific, legal remedy. Thus, though courts cannot control the acts of a visitor done within his jurisdiction, yet a mandamus lies to compel him to exercise his visitatorial power within his jurisdiction ; as to receive and hear an appeal. In the words of Lord Kenyon, the court will put the visitatorial power in motion.² So, it lies to the warden of a college, commanding him to affix the corporation seal to an answer of the fellows to a bill in chancery ; though he disapprove of the answer, and it is contrary to his own separate answer put in ;³ — to the keepers of the common seal of an university, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in the senate ;⁴ and to the mayor of a city corporation, to compel him to put the corporate seal to the certificate of an officer's election, where, by the constitution of the corporation, the mayor is bound to certify the election to the king for his approbation.⁵ In the *Commonwealth v. the Trustees*

¹ Bul. N. P. 199 ; *Rex v. Jotham*, 3 T. R. 577.

² *The King v. the Bishop of Lincoln*, 2 T. R. 338, n. a. ; *the King v. the Bishop of Ely*, 2 T. R. 338 ; *The King v. the Bishop of Ely*, 5 T. R. 477 ; *The King v. the Bishop of Worcester*, et al. 4 M. & S. 415 ; Ayl. H. of Oxford, vol. 2, p. 81 ; Com. Dig. Visitor, C. See Chap. XIX. § 5.

³ *Rex v. Windham*, Cowp. 377.

⁴ *Rex v. Vice Chancellor, &c. of Cambridge*, 3 Burr, 1648.

⁵ *Rex v. York*, 4 T. R. 699, 700 ; and see *Strong, Petitioner, &c.* 20 Pick. (Mass.) R. 484 ; where a mandamus was held to lie to a board of examiners, to compel them to give a certificate of his election to a county commissioner,

of St. Mary's Church,¹ which was an application for a mandamus to compel the trustees of a religious corporation to affix the common seal to certain alterations and amendments of the charter, no objection was taken by the court to the form of remedy; though, for substantial reasons of another kind, the application was rejected. And where the regulations of a corporation rendered it necessary for the acquisition of the freedom, that the indentures of apprenticeship should be enrolled, a mandamus was granted to compel the proper officer to enrol them; the applicant showing in his affidavits the necessity of the enrolment, and that application had been made in vain to the officer to perform his duty.² So a corporator may have a mandamus to compel the custos of corporate documents to allow him an inspection, and copies of them, at proper times and upon proper occasions; he showing clearly a right on his part to such inspection and copies, and refusal on the part of the custos to allow it.³ A director of a bank may also have the writ directed to the cashier who refuses, under a resolution of the board of directors to that effect, to permit him to see the discount book; and in such case, the writ may also be well directed to the Directors themselves.⁴ In such cases, however, there must be a distinct refusal on the part of those having the control of the books to permit the corporator or director to inspect them, he, it seems, stating the purpose for which he demanded the inspection at the time of demand.⁵ A mandamus

though another person, upon a new election ordered, was elected in his place, whom he might be obliged to remove by *quo warranto*.

¹ 6 Serg. & Rawle, (Penn.) R. 508.

² *Rex v. Coopers of Newcastle*, 7 T. R. 545.

³ *Rex v. Newcastle*, 2 Str. 1223; *Rex v. Shelley*, 3 T. R. 142; *Rex v. Babb*, 3 T. R. 580, 581; *Rex v. Lucas*, 10 East. 235; *Edwards v. Vesey*, C. T. H. 128; *Rex v. Tower*, 4 M. & S. 162; *Rogers v. Jones*, 5 D. & R. 484; *Rex v. Travannion*, 2 Chit. R. 366, n.; *Rex v. Chester*, 1 Chit. R. 476, 477, n. 479. When the corporator's application to inspect is founded on his general right, he has a mandamus; but when on a suit pending, he has a rule. *Ibid.* and see *Southampton v. Greaves*, 8 T. R. 592; *Bateman v. Phillips*, 4 Taunt. 162; *Willcock on Mun. Corp.* 349.

⁴ *People v. Throop*, 12 Wend. (N. Y.) R. 183.

⁵ *Rex v. Wilts & Berks Canal Navigation*, 3 Adolph. & Ellis, 477; *Rex v. Trustees of North Leach and Witney Roads*, 5 B. & Adolph. 978.

lies also to the *late* mayor of a city corporation, to deliver the insignia of his office to the *new* mayor ;¹ to a former town clerk,² or clerk of a company³ to deliver to his successor the common seal, books, papers, and records of the corporation, which belong to his custody ; or to a steward who keeps the public books of a corporation, to compel him to attend with the books at the next corporate assembly.⁴ Indeed, it lies to any person who happens to have the books of a corporation in his possession, and refuses to deliver them up ; as to an executor, who refused to deliver up the books of a borough, until money expended by his testator on account of it should be repaid.⁵ The writ has also been directed to canal appraisers, compelling them to appraise damages done by a canal,⁶ to canal commissioners, enforcing a payment by them of assessments duly made under a statute, for recompensing such damages,⁷ and to a railway company, bound by act of parliament to set out their deviations, and make their compulsory purchases within stated periods, to do those acts within the times limited, so that they might complete the line of rail road, which having undertaken they were obliged by the act to finish.⁸ It lies too to compel a mayor to perform any part of his duty, as presiding officer, after he has been guilty of a default in the performance of it.⁹ It has also been granted to compel a canal company to enter upon their books the probate of a will of a deceased shareholder,¹⁰ to register a conveyance,¹¹ though not to

¹ *Rex v. Owen*, Comb. 399 ; *Rex v. Dublin*, 1 Stra. 539 ; *Rex v. Ipswich*, 2 Ld. Ray. 1238 ; *Crawford v. Powell*, 2 Burr. 1016 ; *Rex v. Monday*, Cowp. 539.

² *Crawford v. Powell*, 2 Burr. 1016 ; *Commonwealth v. Athearn*, 3 Mass. R. 285.

³ *Rex v. Wildman*, 2 Stra. 879.

⁴ *Case of the Borough of Calne in Wilts.* 2 Stra. 949.

⁵ *Rex v. Ingram*, 1 Blacks. R. 50.

⁶ *Ex parte Jennings*, 6 Cowen, (N. Y.) R. 518 ; and see *Reg. v. North Union Railway Co.* 8 Dowl. (P. C.) 320.

⁷ *Ex parte Rogers*, 7 Cowen, (N. Y.) R. 526.

⁸ *Reg. v. Eastern Counties Railway Co.* 2 Perr. & Dav. 648.

⁹ *Rex v. Everet*, C. T. H. 261 ; *Rex v. Williams*, 2 M. & S. 144.

¹⁰ *Rex v. Worcester Canal Company*, 1 Man. & Ry. 529.

¹¹ *Cooper v. Dismal Swamp Co.* 2 Murphy, (N. C.) R. 195.

compel them to enrol a conveyance of lands to them pursuant to the provisions of an act, *after the lapse of sixty-five years, without effort during that time to compel them so to do.*¹ And where a statute made it the duty of a turnpike corporation to grant a certificate of amounts due by them for repairs, &c., attested in a certain manner, and to transmit a duplicate of the same to the state treasurer, in order that payment might be made by the State, and deducted out of the appropriations made to the corporation; a mandamus was granted, to compel them to deliver to the relator, and transmit to the treasurer, such a certificate.² A dock company was empowered by act of parliament to make a floating harbor in the city of Bristol; and the directors of the company were authorized and *required* "to make such alterations and amendments in the sewers of said city, as might or should be necessary in consequence of the floating of said harbor;" it was held, that a mandamus lay to the directors, commanding them to "make such alterations," &c. in the words of the act; and that it was neither requisite nor proper to call upon the company to make any specific alterations, the mode of remedying the evil being left to their discretion by parliament.³ Where the act incorporating a dock company directed, that all actions against the company should be brought against the treasurer, or a director for the time being, but that the body, goods, lands, &c. of such treasurer or director should not by reason thereof be made liable, and cross actions between the treasurer, as such, and another were referred to an arbitrator, who awarded against the treasurer, it was held, that mandamus would lie to the treasurer and directors commanding them to pay the sums awarded.⁴ And where a railway company was incorporated by an act, which provided, that the public should have the beneficial enjoyment of the same, it was held, that mandamus would lie, to compel them to lay down, and reinstate the railway; they having torn up the iron tram plates for

¹ *Reg. v. Leeds Canal Co.* 3 Perr. & Dav. (Q. B.) 174.

² *Commonwealth v. the President, Managers, and Company of the Anderson Ferry, Waterford and N. Haven Turnpike Road*, 7 S. & R. (Penn.) R. 6.

³ *The King, v. the Bristol Dock Company*, 6 B. & C. 181.

⁴ *Rex v. St. Catherine's Dock Co.* 4 B. & Adolph, 360; 1 Nev. & M. 121.

several hundred yards, in order to prevent the collieries of others from coming in competition with those of several leading members of the company.¹ In the time of Lord Holt, a mandamus was prayed to the master and wardens of a company of gunmakers, to cause them to give a proof-mark to a freeman of the company, without which, it was urged, he could not sell his guns. According to the report, his lordship rejected the application, upon the ground, that the company was "no legal establishment," and informed the applicant, that his remedy was a petition to the queen for a *quo warranto*, to repeal the charter of the company.² It seems difficult to understand what was meant by the assertion, that the company was "no legal establishment," since it was created by charter; and it is apprehended, that a mandamus would, in such a case, be granted at the present day, without the least hesitation.³ This writ will not, however, be granted to compel a corporation to make leases of lands which, having been leased, have fallen into their hands; for this is their own private property.⁴ In general it should be observed, that a mandamus will not be granted, unless it is clear, that there has been a direct refusal to do that, which it is the object of the writ to enforce, either in terms, or by circumstances which distinctly show an intention not to do the act required.⁵ When a writ of mandamus is fully executed, if it does not effectuate the purposes for which it is granted, the court will, it seems, award a second or auxiliary writ to complete the act begun, and administer ample justice.⁶

§ 4. In noticing those cases in which the writ of mandamus lies to a corporation or its officers, we have necessarily noticed many, where, it has been determined, that this remedy does not

¹ The King v. the Severn and Wye Railway Company, 2 B. & A. 646.

² Anon. 2 Ld. Ray. 989.

³ 2 Kyd on Corp. 299, 300.

⁴ Rex v. Liverpool, 1 Barnard, 83.

⁵ Rex v. Brecknock & Abergavenny Canal Co. 4 Nev. & M. 871; 3 Adolph & Ellis, 217; 1 Har. & Woll. 279.

⁶ Rex v. Water Eaton, 2 Smith, 55.

apply. Although mandamus lies to compel a visitor to hear an appeal and give some judgment,¹ yet, as his jurisdiction is exclusive, and his power discretionary, none lies to control his sentence, or to compel the *doing* of any thing which falls within his jurisdiction.² And though he transcend his jurisdiction, as in executing a sentence of expulsion, yet mandamus does not lie to restore the party expelled, or to reverse the visitor's sentence ; but the injured person is left to his action of ejectment, or of the case for damages.³ It is upon the ground, that the judges of England enjoy a species of visitatorial power over the inns of court, that a mandamus will not lie to compel the benchers to admit a member, or to call one qualified to the bar.⁴

In order to obtain a writ of mandamus, the applicant must show a specific, and complete *right*, which is to be enforced ; and accordingly, the writ was refused to enforce the admission of one as a doctor of the civil law, and a graduate at Cambridge, to be an advocate of the Court of Arches ; Lord Ellenborough observing, that the applicant had no more claim to admission than any other of his majesty's subjects.⁵ Upon the same ground, a mandamus was refused to a doctor of physic, who had been licensed by a college of physicians, to admit him upon examination, as a fellow of the college ;⁶ and in *Rex v. Jotham*,⁷ the court refused a mandamus to restore a minister of an endowed dissenting meeting-house, because it did not appear that he had complied with the requisites necessary to give him a *prima facie* title. The right to be enforced, it seems, must also be a legal

¹ Chap. XIX. § 4 ; and see *Anon.* 2 Penn. R. 737 ; and *Hall v. Supervisors of Oneida*, 19 Johns. (N. Y.) R. 295 ; *Griffith v. Cochran* 5 Binn. (Penn.) R. 87, 103.

² Chap. XIX. § 5.

³ *Ibid.*

⁴ *The King v. Gray's Inn*, 1 Doug. 353 ; *the King v. the Benchers of Lincoln's Inn*, 4 B. & C. 855 ; *Ante*, p. 563.

⁵ *The King v. The Archbishop of Canterbury*, 8 East 213, 219, 240 ; and see *People v. Collins*, 19 Wend. (N. Y.) R. 56. A mere inchoate right is not sufficient. *People v. Trustees of Brooklyn*, 1 Wend. (N. Y.) R. 381.

⁶ *Rex v. College of Physicians*, 7 T. R. 282.

⁷ 3 T. R. 575.

right ; and if it be a mere equitable right, as a trust, the party will be left to his remedy in equity.¹ In the case of the Rugby charity, a mandamus was refused to compel the trustees to pay increased alms to claimants on the funds, although the applicants were at an advanced age, and would probably be dead, before relief could be had in chancery.²

Courts will not exercise their extraordinary power by writ of mandamus to effect purposes, as well effected by the ordinary remedies ; and accordingly to obtain relief by this process, the applicant must not only show a specific legal right, but there must be no other specific remedy, adequate to enforce that right.³ Upon this ground a mandamus has been refused to compel a bank to permit a transfer of stock on the books of the company, since complete satisfaction, equivalent to a specific relief, may be obtained in an action of the case ;⁴ and to compel a railway company to carry goods, there being nothing in the act, rendering it compulsory on the company to carry, and they being liable in an action, as common carriers.⁵

¹ Ibid. ; and the *King v. The Marquis of Stafford*, 3 T. R. 646, 651, 652, per Buller, J.

² *Ex parte Rugby Charity Trustees*, 9 D. & R. 214.

³ *Middleton's Case*, 1 Sid. 169 ; *Rex v. Ward*, Fitzgib. 124 ; *Rex v. Owen*, Comb. 399 ; *Rex v. Dean and Chapter of Dublin*, 1 Stra. 538 ; *Rex v. Barker et al.* 1 W. Blacks. 352 ; *Rex v. Marquis of Stafford*, 3 T. R. 651 ; *Rex v. Canterbury*, 8 East. 219 ; *Rex v. Margate Pier Company*, 3 B. & A. 224 ; *Rex v. Haythorne*, 5 B. & C. 422, 429 ; *Rex v. Severn and Wye Railway Comp.* 2 B. & A. 646 ; *Rex v. Dean*, 2 M. & S. 80 ; *Rex v. Bank of England*, Doug. 526 ; *Rex v. Commissioners of Customs*, 1 Nev. & P. (K. B.) 536 ; 5 Adolph & Ellis 380 ; *The Commonwealth v. Rosseter et al. Trustees of St. Mary's Church*, 2 Binn. (Penn.) R. 368 ; *Shipley v. the Mechanics Bank*, 10 Johns. (N. Y.) R. 484 ; *People v. Trustees of Brooklyn*, 1 Wend. (N. Y.) R. 318 ; *The King v. the Free Fishers, &c. of Whitstable*, 7 East, 356, per Lawrence, J. ; *Boyce v. Russel*, 2 Cow. (N. Y.) R. 444 ; *The People v. Mayor of New York*, 25 Wend. (N. Y.) R. 680 ; *Ex parte Lynch*, 2 Hill. (N. Y.) R. 45 ; *The State v. Holiday*, 3 Halst. (N. J.) R. 205 ; *Oakes v. Hill*, 8 Pick. (Mass.) R. 47 ; *Rex v. Windham, Cowp.* 378.

⁴ *The King v. the Bank of England*, Doug. 526 ; *Boyce v. Russel* 2 Cow. (N. Y.) R. 444 ; *Shipley v. The Mechanics Bank*, 10 Johns. (N. Y.) R. 484 ; and see *Asylum, &c. v. Phoenix Bank*, 4 Conn. R. 172.

⁵ *Robins ex parte*, 7 Dowl. (P. C.) 568.

It has been refused also to compel a bank,¹ or to compel a fishing company,² to produce their accounts, and divide, or pay over to the stockholders, or freemen, the profits; the remedy being in equity. Neither will a court grant a mandamus to compel the trustees of an incorporated church, to restore the prosecutor to the possession of a pew to which he claims title, inasmuch as he has another complete remedy, by an action on the case against the person disturbing him.³ And in England, mandamus will not lie to a corporation, commanding it to pay a poor's rate, unless, indeed, it be shown in the applicant's affidavits, that the corporation had no effects upon which a distress could be levied.⁴ It is hardly necessary to add, that a mandamus will not be granted to enforce an act, as a reference to arbitrators, which it is evident from the facts could have no result.⁵

It is said by Mr. Justice Buller, in *The King v. The Marquis of Stafford*, that if the party applying for a mandamus "show a legal right, and there be also a remedy in equity, that is no answer to an application for a mandamus; for when the court refuse to grant a mandamus, because there is another specific remedy, they mean only a *specific remedy at law*."⁶ It is true, that the courts in laying down the rule usually say, that mandamus will not lie where there is another specific *legal* remedy; but in *The King v. The Free Fishers, &c. of Whitstable*,⁷ and in *The King v.*

¹ *The King v. The Bank of England*, 2 B. & A. 620, 622.

² *The King v. The Free Fishers, &c. of Whitstable*, 7 East, 356, per Lawrence, J.

³ *The Commonwealth v. Rosseter et al. Trustees of St. Mary's Church*, 2 Binn. (Penn.) R. 360; and see *Francis v. Ley*. Cro. Jac. 366; *Dawney v. Dee et al.* *ibid.* 605. *Kenrick v. Taylor*, 3 Wils. 326; *Stocks v. Booth*, 1 T. R. 428.

⁴ *The King v. the Margate Pier Company*, 3 B. & A. 221, 224, 225.

⁵ *Reg. v. Northwich Savings Bank*, 9 Adolph & Ellis, Q. B. 729; 1 Perr. & Dav. 477.

⁶ 3 T. R. 651, 652; and see the *People v. Mayor, &c. of New York*, 10 Wend. (N. Y.) R. 293; *Ex parte Nelson*, 1 Cow. (N. Y.) R. 423; *The People v. Supervisors of Albany*, 12 Johns. (N. Y.) R. 414.

⁷ 7 East. 356, per Lawrence, J.

The Bank of England,¹ the Court of King's Bench gave as a reason for refusing a mandamus, that there was a complete remedy in Chancery; and there seems but little reason, at the present day, for a court of law refusing to notice the relief that chancery can afford.

In order to exclude the writ of mandamus, the remedy must, however, be *adequate*, or must afford *specific*, or what in the case is equivalent to specific relief.² Thus, though trover or detinue would lie for the insignia of office belonging to a corporation, yet as we have seen, mandamus lies to compel the old mayor to yield them to the new, because, as is said, the office is annual, and it is necessary that the mayor should have them immediately, in order to command the more respect.³ It lies too, to compel an officer to execute the duties of his office, though he be liable to penalties or an action of the case, for the neglect of them.⁴ And though it was admitted, that an indictment would lie against a railway company for injuring their railway, so as to render it impassable, the act of parliament, by which they were incorporated, providing that the public should have the beneficial enjoyment of the same, yet it was also held, that mandamus would lie to compel the company, to reinstate and lay down again the railway; for, it was said, that an indictment could not compel the corporation to repair the road, and that at all events a considerable delay must take place.⁵ In the case of *Clarke v. the Bishop of Sarum*, reported in *Strange*,⁶ and *Andrews*,⁷ it appears that the court ordered a mandamus, where a *quare impedit* would lie,

¹ 2 B. & A. 622, per Bayley, J.

² See *Rey v. the Bank of England*, Doug. 526, per Lord Mansfield.

³ See ante, pages 572, 573; and *Rex v. Dublin*, 1 Stra. 537, 538, 539, per Powys, Jus; *Rex v. Owen*, Comb. 399; *Rex v. Ipswich*, 2 Ld. Ray. 1238; *Crawford v. Powell*, 2 Burr. 1016; *Rex v. Monday*, Cowp. 539.

⁴ *Rex v. Everet*, C. T. H. 261; *McCollough v. Brooklyn*, 23 Wend. (N. Y.) R. 458; *Western v. Brooklyn* 23 Wend. (N. Y.) R. 334.

⁵ *The King v. the Severn and Wye Railway Company*, 2 B. & A. 646, 650, 651; *The King v. the Commissioners of the Dean Inclosure*, 2 M. & S. 80; *The People v. Mayor, &c. of New York*, 10 Wend. (N. Y.) R. 293.

⁶ 2 Stra. 1082.

⁷ Andr. 20.

upon the ground, that the former was a more *expeditious* and *less expensive* remedy than the latter. This case is not, however, to be considered as authority ; for when it was subsequently cited, Lord Mansfield remarked, that Mr. Justice Dennison had always thought that case wrong ; and added as a reason, that no case was proper for a mandamus, but where there is no other specific remedy.¹ We have before seen, that as the remedy for a freehold office by assize has become obsolete, it never makes any part of the consideration whether a mandamus ought to be granted or not.²

If discretionary power is granted to a corporation or its officers over any subject, though the court may issue a mandamus to compel them to exercise their discretion, yet it will not control them in the exercise of it. This principle is illustrated by the case of a visitor, before referred to, who may be enforced to hear and decide an appeal, but whose sentence cannot be reversed.³ And where all the powers of a religious corporation were vested in certain trustees, and a mode was prescribed by statute, in which any corporations *desirous* of altering or amending their charters might proceed, a mandamus, on the motion of several of the members of the corporation, to compel the trustees to take the necessary steps to alter the charter, was refused on the ground, that this was left to them as a matter of discretion.⁴

In the case of the *King v. The Bristol Dock Company*,⁵ too, where it appeared that the directors of the company were authorized and required "to make such alterations and amendments in the sewers, as were necessary in consequence of the floating of the harbor," it was held, that a mandamus in the terms of the act was in the proper form ; and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left at their discretion by the act of parliament. Indeed it is a general rule, that wherever there is a

¹ *Powell v. Millbank*, 1 T. R. 399, 400, 401, 402, in the note ; Cowp. 103, n.

² Ante, p. 567.

³ Ante, p. 547, and see Chap. XIX. § 4 and 5.

⁴ *Case of St. Mary's Church*, 6 Serg. & Rawle, (Penn.) R. 498.

⁵ 6 B. & C. 181.

discretionary power vested in officers, the Court will not interfere by mandamus ; for they cannot, and ought not to control them in the exercise of it.¹

§ 5. If the applicant for a mandamus makes out a probable case, in general, a rule is granted upon the defendant to show cause why the writ should not issue ; and this rule must be directed to and served upon the persons to whom the writ is to be directed, all those principally interested in the defence being included in it.² Where, however, full notice has been given to him or those against whom the mandamus is prayed, and their interests have been represented before the court, the rule has been dispensed with, and a mandamus granted upon motion ;³ though without due notice of the motion, a mandamus will never be granted.⁴ Buller thinks there may be this difference between a mandamus to restore and a mandamus to admit ; that where it is to swear or to admit, the Court will, in case the right appear plain, grant the writ upon the first motion ; but where it is to restore one who has

¹ *Gile's Case*, Stra. 881 ; *Rex v. Nottingham, Sayer*, 217 ; *Wilson v. Supervisors of Albany*, 12 Johns. (N. Y.) R. 414 ; *Hall v. Supervisors of Oneida*, 19 Johns. (N. Y.) R. 259 ; *Blunt v. Greenwood*, 1 Cowen, (N. Y.) R. 15 ; *Ex parte Nelson*, *ibid.* 417 ; *Ex parte Bailey*, 2 Cowen, (N. Y.) R. 479 ; *Matter of Gilbert*, 3 *ibid.* 59 ; *Ex parte Johnson*, *ibid.* 371 ; *Ex parte Bacon*, 6 *ibid.* 392 ; *Ex parte Benson*, 7 *ibid.* 363 ; *Com. v. The Judges of Common Pleas*, 3 Binn. (Penn.) R. 273 ; *Griffith v. Cochran*, 5 *ibid.* 87, 103 ; 6 *ibid.* 456 ; *Com. v. The County Commissioners*, 5 *ibid.* 536 ; *Respublica v. Clarkson*, 1 Yeates, (Penn.) R. 46 ; *Respublica v. Guardians of the Poor*, *ibid.* 476 ; *Anon.* 2 Penn. R. 576 ; *Foreman v. Murphy*, *ibid.* 1024 ; *The People v. The Sup. Court of the city of N. Y.*, 5 Wend. (N. Y.) R. 144 ; *Chase v. Blackstone Canal Co.* 10 Pick. (Mass.) R. 244 ; *Rice v. Commissioners of Middlesex*, 13 Pick. (Mass.) R. 225 ; *Gibbs v. Commissioners of Hampden*, 19 Pick. (Mass.) R. 208 ; *Inhabitants of Ipswich, Petitioners, &c.*, 24 Pick. (Mass.) R. 343.

² *B. N. P.* 200 ; *Rex v. Bankes*, 1 Wm. Black. 445 ; *S. C.* 3 Burr. R. 1453 ; *Rex v. St. John's Coll. Skin.* 549 ; *People v. Everitt*, 1 Caines, (N. Y.) R. 8 ; *Ex parte Bostwick*, 1 Cowen, (N. Y.) R. 143.

³ *Ex parte Rogers*, 7 Cowen, (N. Y.) R. 526, 532, 533, 534 ; and see *Rex v. Justices of Berkshire*, *Sayer*, 160 ; *Rex v. Aldermen of Heydon*, *Sayer*, 208, 209.

⁴ *Anon.* 2 Halst. (N. J.) R. 192.

been removed, they would first grant a rule to show cause why the writ should not issue."¹ The reason is, that in the former case, the writ is granted merely to enable the party to try his right; whereas, in the latter, he may try his right without the writ, by bringing an action for money had and received, for the profits.² Upon a party's appearing to show cause why the writ should not issue, the relator has the affirmative.³ Where a rule is obtained, if upon it the defendant do every thing for the performance of which the writ is sought, the rule will be discharged, and the defendant saved the expense of making a return.⁴ But though he do all that is required of him, after the rule is made absolute, and before the issuing of the writ, yet if in fact the writ afterwards issue, the court will not supersede it, but leave him to show his obedience to their precept in his return.⁵ The defendant may show for cause, why the writ should not be granted, any of the reasons before stated why the writ will not lie, or the applicant has not a right to it,⁶ or he may show that the applicant has, by his own neglect, or misconduct, precluded himself from all right to the assistance of the court.⁷ If the affidavits upon which cause is shown by the defendant, so positively and expressly deny the facts charged in the affidavits upon which the rule to show cause is made, that if the denial be false, an indictment will lie for the perjury, it is the course of the court to discharge the rule, and leave the party, upon whose application it was obtained, to prosecute for perjury.⁸ In England, if the affidavits upon which cause is shown are sworn before a commissioner, they cannot be read unless the name of the place where they are sworn is inserted in the jurat. The object of this rule

¹ B. N. P. 199.

² *Rex v. Jotham*, 3 T. R. 577, 578, per Buller, J.

³ *The People v. Throop*, 12 Wend. (N. Y.) R. 183, note.

⁴ *Rex v. Liverpool*, 1 Barnard, 83; *Anon. Ibid.* 362.

⁵ *Ibid.*

⁶ Willcock on Mun. Corp. 384, 385.

⁷ *Ibid.*; and see *The People v. Delaware C. P.*, 2 Wend. (N. Y.) R. 256; *The People v. Seneca C. P.*, 2 Wend. (N. Y.) R. 264.

⁸ *Per Curiam, Rex v. Harrison. Sayer*, 111.

is, to point out a venue for laying the perjury if the affidavits are false, and to assist the court in ascertaining from their records the fact of the person being a commissioner.¹ In New York, the general practice, on denying motions for a mandamus, has been, not to give costs ; especially, where the motion is merely *ex parte*. But where notice of the motion is given to the adverse party, and the law is plain against the relator, costs will follow the denial.²

If after the parties have been heard upon the rule, the applicant still has a reasonable claim to the writ, upon a doubt either in fact or law, the rule will be made absolute ; though it is said, that the court will not readily grant applications of a novel kind, which may probably tend to the disturbance of corporations in general.³ It is not necessary that the rule of court should specify the whole mandamus ;⁴ but it must give the general outline, to be filled up in the more particular phraseology of the writ.⁵ In New York, where a mandamus, whether alternative or peremptory, is granted upon motion, costs are not usually given to the relator ; but if he wishes to secure them, he must go to his demurrer, or issue in fact.⁶

§ 6. It is said, that writs of mandamus were originally no more than letters, by which the king enjoined his officers, &c. to do their duty ; and that it was not until the twelfth year of the reign of William the Third, that they were ever entered of record ; when, a rule was made, that they should be entered of the same term they came in.⁷ They have now, however, become formed writs, and like other writs must bear teste in term.⁸ No precise

¹ *Rex v. West Riding*, 3 M. & S. 494.

² *Ex parte Root*, 4 Cowen, (N. Y.) R. 548.

³ *Rex v. Rye*, 2 Keny. Cas. 468 ; *Rex v. West Looe*, 5 D. & R. 599 ; *Willcock on Mun. Corp.* 385.

⁴ *The King v. Willis*, 7 Mod. 262, per Chapple, J.

⁵ *Willcock on Mun. Corp.* 386. For form of a rule for a peremptory mandamus, see *Ex parte Jennings*, 6-Cowen, (N. Y.) R. 529.

⁶ *People v. Supervisors of Columbia*, 5 Cowen, (N. Y.) R. 291.

⁷ *Rex v. Dublin*, 1 Stra. 540, per Fortescue, J.

⁸ *Ibid.* ; and 2 Keble, 91.

form is necessary in a mandamus ;¹ but it is in substance, a command in the name of the sovereign power to persons, corporations, or inferior courts of judicature within its jurisdiction, requiring them to do a certain specific act, as being the duty of their office, character, or situation, agreeably to right and justice.² Though, as we are told by Mr. Willcock, the writ may enlarge in directing those things which are, as it were, incidents to a mandamus ; and in drawing it up the practice of the court is to be observed, instead of adhering to the strict letter of the rule, yet, in all material circumstances, it must follow the rule upon which it is founded.³ Accordingly, where a motion was made for a mandamus to the mayor of a corporation, to assemble the body and do the corporate business, and in drawing up the writ, they made it out for an assembly, and to admit all persons having a right to the freedom, who should appear before them and demand it, the writ was superseded.⁴ And where the rule for a mandamus to the clerk of a company was, to deliver all the books, papers, &c. to the new clerk, and the writ commanded him to deliver them to the company, the variance was held fatal to the writ.⁵

The party who applies for a writ of mandamus must see that it is rightly directed ; for if it be directed to the wrong persons, it may be superseded on motion or argument ;⁶ and if it be directed to a corporation by an erroneous name, this must be relied upon in the return, and thereupon the writ is superseded as upon a plea in abatement.⁷ If the act commanded must be done by the whole corporation, or if a portion of the act, by the whole corporation, and another portion, by the head officer, in the first case,⁸ the writ *ought* to be directed, and

¹ *Rex v. Nottingham*, Sayer, 37, per Lee, C. J. For form of Mandamus see *Blunt v. Greenwood*, 1 Cowen, (N. Y.) R. 15, 22, note, e.

² 2 Sel. N. P. (Wheat's ed.) 816.

³ Willcock on Mun. Corp. 387.

⁴ *Rex v. Kingston*, 1 Stra. 578 ; S. C. 8 Mod. 210 ; S. C. 11 Mod. 382.

⁵ *Rex v. Wildman*, 2 Stra. 879, 880 ; *Rex v. Water Eaton*, 2 Smith, 55.

⁶ *Rex v. Norwich*, 1 Stra. 55 ; *Rex v. Hereford*, 2 Salk. 701 ; *Rex v. Abingdon*, 1 Ld. Ray. 560 ; *Rex v. Smith*, 2 M. & S. 598.

⁷ *Regina v. Ipswich*, 2 Ld. Ray. 1239 ; S. C. 2 Salk. 435.

⁸ *Rex v. Smith*, 2 M. & S. 598 ; *Rex v. Abingdon*, 1 Ld. Ray. 560.

in the latter,¹ it is most proper to direct it to the whole corporation ; and not to the different enumerated classes, or individual members, who compose it. And though the head officer, who is an integral part of the corporation, and included in the corporate name, be dead, and the writ be to compel an election to the vacant place, this does not alter the case.² If the act commanded is to be done by a select body, the writ may be directed to the select body,³ or to the whole corporation,⁴ since the act of the select body is the act of the corporation. But if being directed to a select body, it include in its direction any others than those whose duty is to obey the command, it will be superseded for misdirection.⁵ The writ must be directed to the corporation or select body, not only in their proper names, but in their proper capacity, and the application must state that capacity.⁶ Though several persons may be included as prosecutors in the same writ, at the discretion of the court, and will be, where they constitute but one officer, and claim in the same right ;⁷ they being entitled in such case only to one writ ;⁸ yet several distinct rights cannot be included in the same writ ; as, to restore or admit several persons to their offices in the same corporation.⁹ Neither can one and the same writ of mandamus

¹ *Rex v. Tregony*, 8 Mod. 112, 128.

² *Rex v. Borough of Plymouth*, 1 Barnard, 81 ; *Rex v. Cambridge*, 4 Burr. 2011 ; *Rex v. Smith*, 2 M. & S. 598.

³ *Taylor v. Gloucester*, 1 Rol. 409 ; *Rex v. Gloucester*, Holt's R. 451 ; *Pees v. Leeds*, 1 Stra. 640, n. ; *Rex v. Smith*, 2 M. & S. 298.

⁴ *Holt's Case*, Freem. 442, and n. ; S. C. S. Jones, 52 ; *Rex v. Abingdon*, 1 Ld. Ray. 560 ; *Rex v. Gloucester*, Holt's R. 451 ; *Rex v. Newsham*, Sayer, 212 ; *Rex v. Smith*, 2 M. & S. 598.

⁵ *Rex v. Smith*, 2 M. & S. 598 ; *Rex v. Abingdon*, 2 Salk. 700 ; S. C. 1 Ld. Ray. 560 ; *Rex v. Hereford*, 2 Salk. 701 ; *Pees v. Leeds*, 1 Stra. 640 ; *Rex v. Norwich*, 1 Stra. 55 ; *Rex v. Wigan*, 2 Burr. 782.

⁶ *Papilion and Dubois Case*, Skin. 64 ; *Rex v. West Looe*, 3 B. & C. 685 ; S. C. 5 D. & C. 599.

⁷ *Rex v. Montacute*, 1 Wm. Black. 60 ; *Rex v. Kingston*, 1 Stra. 578, n. ; *Rex v. Ipswich*, 1 Barnard, 407.

⁸ *Scott v. Morgan ex parte*, 8 Dowl. (P. C.) 328.

⁹ *Rex v. Kingston*, 1 Stra. 578 ; *Andover Case*, 2 Salk. 433 ; *Anon.* 2 Salk. 436 ; *Rex v. Chester*, 5 Mod. 11 ; *Rex v. Liverpool*, 1 Barnard, 83 ; *Rex v. Water Eaton*, 2 Smith, 55.

be directed to the officers of several corporations, to enforce them to perform distinct duties, growing out of distinct liabilities.¹

The right of the applicant, and the default of the defendant must be shown in the writ; though a defect in these particulars may be cured by a return admitting the title, and avoiding it by some other objection.² Where the right to be enforced is a general right, and no particular person is interested, the general right must be shown in the writ.³ The writ must contain convenient certainty, in setting forth the duty to be performed; but it need not particularly set forth, by what authority the duty exists.⁴ If the mandamus be to compel one to serve in a corporate office to which he is elected, it is not necessary to aver, that he was able and fit to serve, but only to state his liability, election, and refusal to undertake the office without reasonable cause.⁵ It is said by Mr. Willcock, that the command must be to perform some definite and specific act or acts, so that a certain and conclusive return may be made, that the act is done.⁶ This must be understood, however, to refer to those cases in which the officer or corporation acts merely in a ministerial capacity; and not where the mode of action, the object being specified, is left to his or their discretion. Thus, as we have seen, where the directors of the Bristol Dock Company were empowered "to make such alterations and amendments in the sewers of the city, as might or should be necessary in consequence of the floating of the harbor,"

¹ *State v. Township Committees of Chester & Evesham*, 5 Halst. (N. J.) R. 292.

² *Rex v. Whiskin*, Andr. 3; *Rex v. Coopers of Newcastle*, 7 T. R. 548; *Peat's Case*, 6 Mod. 310; *Rex v. Bristol*, 1 Show. 288. In a writ to admit, however, it is not necessary to aver a tender of the fee payable on admission; though this must be stated in the application. *Moore v. Hastings*, C. T. H. 363.

³ *Rex v. Nottingham*, Sayer, 36; S. C. Bul. N. P. 201; *Rex v. Devizes*, Ib. 204.

⁴ Bul. N. P. 204; *Rex v. Bettsworth*, 2 Stra. 857; *Rex v. Ward*, 2 Ib. 897.

⁵ *Rex v. Merchant Taylors*, 2 Lev. 200.

⁶ Willcock on Mun. Corp. 394; and see *Andover Case*, 2 Salk. 433; *Anon.* Ib. 436; *Rex v. Kingston*, 1 Stra. 578; *Rex v. Water Eaton*, 2 Smith, 55; *Rex v. Liverpool*, 1 Barnard, 83.

a mandamus to them, "to make such alterations and amendments in the sewers of said city, as might or should be necessary in consequence of the floating of said harbor," was held sufficient ; and that it was neither requisite nor proper to call upon the company to make any specific alterations, the mode of remedying the evil being left to their discretion.¹ A writ of mandamus, ordering a corporation to command certain persons to do an act, was quashed as absurd ; it should have commanded the corporation to do it.² If the mandamus be to compel an election, the command should not be to elect a particular person, but to proceed to the election of some one to supply the vacancy.³ The term "*evidentias*" has been held sufficient to include corporate documents, in a mandamus to compel their delivery ;⁴ but it has been made a question whether the command to deliver books in the possession of an ex-officer should be, to deliver them to the corporation, or to the officer who is to have the custody of them. Though they must be received by the new officer, it would seem most proper to command them to be delivered to the corporation.⁵ In the case of *The King v. Nottingham*, however, the writ commanded the delivery to be made to the new officer.⁶

Unless the mandamus be peremptory, the command is to do the act, or show cause to the contrary. The writ will not, however, be superseded, though the words "or show cause" are omitted ; for, it is the very nature of an alternative mandamus, to compel the defendant to perform the act, or show good cause for his refusal.⁷ In an alternative mandamus, the relator sets forth

¹ *The King v. The Bristol Dock Company*, 6 B. & C. 181 ; 9 D. & R. 309.

² *Regina v. Derby*, 2 Salk. 436.

³ *Rex v. Bridgewater*, 2 Chit. R. 257 ; *Shuttleworth v. Lincoln*, 2 Bulstr. 122 ; 2 Rol. Abr. Restitut. 5 ; *Anon*, 2 Barnard, 237.

⁴ *Rex v. Nottingham*, 1 Sid. 31.

⁵ *Willcock on Mun. Cor.* 395 ; *Rex v. Holford*, 2 Barnard, 330, 350 ; *Rex v. Wildman*, 2 Stra. 879.

⁶ *Rex v. Nottingham*, 1 Sid. 31.

⁷ *Rex v. Owen*, 5 Mod. 315 ; S. C. Comb. 399 ; *Rex v. St. John's Coll.* 1 Vent. 549. For form of alternative mandamus, see *People v. Judges of Westchester*, 4 Cowen, (N. Y.) R. 73.

his title, or the facts upon which he relies for relief, and this he should do clearly and distinctly, and not by reference to affidavits and papers on file ; and by it on the other hand, the defendant is required to do the particular act required, or show cause to the contrary.¹

§ 7. Service of the writ should be made upon him who is to make the return, and where the writ is directed to the corporation, it should be served upon the head officer.² In the case of *Rex v. Fowey*,³ however, it was held, that a personal service on the town-clerk of a public corporation was sufficient to found an application for an attachment. If the writ is informal, the party may apply to amend it at any time before the return,⁴ even, it seems, in a departure from the rule ; though after a motion to quash the writ for such a departure, or for insufficiency in substance, it must be superseded.⁵ If, however, the objection be to the form of the writ merely, it may be amended by leave of the court.⁶ After the return has been made and traversed, the court will not permit an amendment in the mandamus.⁷ In *Rex v. The Mayor of York*,⁸ it was held by Kenyon, C. J. and Buller, J., that the defendant would not be permitted to avail himself of any exception to the writ after the return. But it would seem, that though an objection to the form of the writ may be taken before the time for making the return has expired, and that after that time the court will not supersede the writ, until the return is made, unless for gross faults, or because the writ has

¹ *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. (N. Y.) R. 25.

² *Rex v. Exeter*, 12 Mod. 251.

³ 4 D. & R. 614.

⁴ *Rex v. Clitheroe*, 6 Mod. 133, per Holt, C. J.

⁵ *Ibid.* ; *Rex v. Water Eaton*, 2 Smith, 55, 56 ; *Rex v. Marg. Pier Comp.* 3 B. & A. 224 ; *Rex v. Kingston*, 1 Stra. 578 ; *Rex v. Wildman*, 2 Stra. 880.

⁶ *Ibid.*

⁷ *Rex v. Mayor of Stafford*, 4 T. R. 690.

⁸ 5 T. R. 74, 75.

issued erroneously,¹ yet that an objection may be taken after the return, although the return is bad, and indeed at any time before the peremptory mandamus has issued.² "According to the ancient practice," says Mr. Willcock, "if a return was not made in due time to the original writ, an *alias* issued, and a *pluries* returnable immediately, and if no return was made to that, on affidavit of service, an attachment was obtained against the defendant for disobedience to the process of the court."³ Since the 9th of Anne, ch. 20, § 1, to compel a return to mandamus, the court of King's Bench does not drive the prosecutor to an *alias* and *pluries*, even in cases not falling within its provisions; but compels a return to the first writ.⁴

§ 8. The return must be made by the body or persons to whom the writ is directed; and if the writ is directed to a corporation, though the head officer be merely an officer *de facto*, yet he must join in the return.⁵ Where a mandamus was directed to B. C. and others, as a township committee, a return made by them, as a *late* township committee, was held good.⁶ The same certainty is required, it has been said, in a return to a writ of mandamus as in indictments, or returns to writs of habeas corpus.⁷ Whether the same strictness of certainty is necessary in a return to a mandamus, as in an indictment, may well be

¹ *Rex v. Norwich*, 1 Stra. 55; *Rex v. Tregony*, 8 Mod. 112; *Rex v. Willingford*, 2 Barnard, 132; *Rex v. Whitchurch*, *ibid.* 447; *Whitford v. Jocam*, Sel. N. P. (Wheat's ed.) 829; *Rex v. Kingston*, 8 Mod. 218; S. C. 11 Mod. 382; Willcock on Mun. Corp. 397.

² *Rex v. Kingston*, 8 Mod. 210; S. C. 11 Mod. 382; *Rex v. Ward*, 2 Str. 897; *Rex v. Smith*, 2 M. & S. 598; *Rex v. Margate Pier Company*, 3 B. & A. 223; Willcock on Mun. Corp. 397.

³ Willcock on Mun. Corp. 398; and *cites Anon.* 2 Salk. 434; *Da Costa v. Russia Company*, 2 Str. 783; *Anon.* 11 Mod. 265.

⁴ Willcock on Mun. Corp. 399, 400.

⁵ *Manaton's Case*, T. Ray, 365; *Steven's Case*, *ibid.* 432; *Knight v. Wells*, 1 Lutw. 519; *Rex v. Lisle*, Andr. 173; *Rex v. Clitheroe*, 6 Mod. 133.

⁶ *The State v. Griscom*, 3 Halst. (N. J.) R. 136.

⁷ Per Buller, J. *Rex v. Lyme Regis*, Doug. 158.

doubted. In the *King v. Lyme Regis*,¹ Lord Mansfield, Buller Justice concurring, says, "There is a great difference between a *charge* as a ground of disfranchisement, and an indictment. In criminal prosecutions, technical forms are established, and ought to be followed. If, in an indictment, you say that A. forged, *and* caused to be forged, the proof of either fact will support the indictment; but to say that he forged, *or* caused to be forged, would be bad. This, being determined, must be adhered to. But such nicety is not required in accusations against a corporator in a corporate court. *There*, substantial certainty is all that is necessary." The return must, however, be certain upon a reasonable construction; and where presumption and intendment are permitted, it is said, they will be in favor of the return.² It must state facts, and not conclusions of law,³ must not be argumentative, nor aver material facts by way of recital,⁴ but must positively and expressly⁵ assert, deny, or answer, all facts in their full extent, the assertion, denial, or avoidance of which may be necessary for justification or defence.⁶ Thus, if the return rely upon the misdirection of the writ, it must assert positively that it is misdirected, and show in what manner.⁷ If it rely upon a judgment, however, the proceedings upon which it is founded

¹ 1 Doug. 181.

² 11 Co. 99 b; *Rex v. Abingdon*, 12 Mod. 401; S. C. 1 Ld. Ray. 560; S. C. 2 Salk. 432; *Rex v. Sterling, Sayer*, 175; *Rex v. Lyme Regis*, Doug. 153, 154; Willcock on Mun. Corp. 403.

³ *Rex v. Liverpool*, 2 Burr. 731; *Rex v. York*, 5 T. R. 76.

⁴ *Rex v. Winchelsea*, 2 Lev. 86; *Rex v. Hereford*, 6 Mod. 309; *Basset v. Barnstable*, T. Ray, 153; S. C. 1 Sid. 286; *Rex v. Coventry*, 1 Ld. Raymd. 391; S. C. 2 Salk. 430; *Rex v. Ilchester*, 4 D. & R. 330.

⁵ *Rex v. Malden*, 1 Ld. Raymd. 481; S. C. 2 Salk. 431; *Rex v. Ipswich*, 2 Ld. Raymd. 1239; S. C. 2 Salk. 435; *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. (N. Y.) R. 25. A denial may, however, be composed of several assertions. *Rex v. King's Lynn*, Andr. 105. But a denial of the matters of the writ, with a protestando, is ill. *Rex v. Bristol Dock Co.* 6 B. & C. 181; 9 D. & R. 309.

⁶ *Rex v. Clapham*, 1 Vent. 111; S. C. *Rex v. President des Marches*, 2 Lev. 86; *Rex v. Coventry*, Salk. 430; *Rex v. Ilchester*, 4 D. & R. 330; *Rex v. Lyme Regis*, Doug. 79, 85.

⁷ *Rex v. Ipswich*, 2 Ld. Raymd. 1239; S. C. 2 Salk. 435.

need not be set forth ; for these cannot be investigated, except upon writ of error, unless for the purpose of showing fraud or collusion.¹ A return by county commissioners to an alternative mandamus directing them to take supervision of a bridge, as a part of a highway laid out by the court of sessions, was held good, though the return set forth that the bridge had been dedicated to the public, without averring in what manner ; the proceedings of the town, which were made part of the return, showing for what purpose the bridge was built, and the building of a bridge on a highway being *ipso facto* a dedication of it to the public.² A return to a writ of mandamus need not be single, but may contain several defences, or justifications ; and if one of these be sufficient, the return must be allowed as to that.³ It is sufficient if it contain a legal reason for not obeying the writ, though certain facts of it are unsatisfactory ; for these may be considered as surplusage, and the remainder tried.⁴ Where, however, inconsistent causes for not obeying the mandamus are stated in the return, it must be quashed ; for, taken as a whole, it is false.⁵ Neither the signature of an individual, nor the seal of a corporation is necessary to the validity of a return by them to a mandamus.⁶

Ouster upon *quo warranto* is always a sufficient return to a mandamus to admit, where the ouster took place prior to the prosecutor's acquisition of the title to admission upon which he relies.⁷ Where the writ avers generally, that the prosecutor has

¹ *Rex v. West Riding*, 7 T. R. 467 ; *Rex v. Suddis*, 1 East, 315.

² *Springfield v. Commissioners of Hampden*, 10 Pick. (Mass.) R. 59.

³ *Rex v. Norwich*, 2 Ld. Raymd. 1244 ; *Wright v. Fawcett*, 4 Burr. 2044 ; *Rex v. Cambridge*, 2 T. R. 261.

⁴ *Rex v. Cambridge*, 2 T. R. 461 ; *Rex v. York*, 6 T. R. 495 ; *Rex v. Bristol*, 1 Show. 288 ; *Springfield v. Commissioners of Hampden*, 10 Pick. (Mass.) R. 59.

⁵ *Rex v. Chalice*, 2 Ld. Raymd. 848 ; *Thetford Case*, 1 Salk. 192 ; *Rex v. St. John's Coll.* 4 Mod. 241 ; *Powel v. Price*, Comb. 41 ; *Liddleston v. Exeter*, Comb. 422 ; S. C. 12 Mod. 126 ; S. C. 1 Ld. Raymd. 223 ; *Rex v. Holmes*, 3 Burr. 1644.

⁶ *Widdrington's Case*, T. Ray, 68.

⁷ *Rex v. Serie*, 8 Mod. 332 ; S. C. *Rex v. Hull*, 11 Mod. 391 ; *Rex v. Taylor*, 7 Mod. 172.

been elected, it is sufficient to answer generally in the return, that he has not been elected,¹ or, what is the same thing, that he has not been *duly* elected.² This general answer, however, is not sufficient if the writ sets forth certain facts, and concludes with, "by reason whereof the prosecutor was elected;" but the return in such case should traverse some material fact, on the truth of which the election is founded; or, if this cannot be done, and the facts stated are nevertheless insufficient to sustain the election, it should state what is necessary to a legal election, and negative the legal nature of that set forth in the writ.³ Where the writ avers, that the corporation were duly assembled on a certain day, and elected the prosecutor, it is not sufficient for the return to admit a corporate assembly on that day sufficient for the election of other officers, and merely to aver, that they were not duly assembled for the election of the prosecutor; but some fact must be stated, showing why the assembly was incompetent to proceed to such an election.⁴ It is not sufficient to return that the prosecutor was not elected *at the time* the writ was received; for he might have been elected *before*; but if the writ states that he was elected in a certain week, a return denying his election in that week is sufficient.⁵ If the corporation are entitled to judge of the fitness of the prosecutor's deputy, the return to a mandamus to admit him may state that right, and that the deputy is not a sufficient person.⁶ So, if the approbation of a certain officer, or the payment of a certain fine is necessary to entitle the prosecutor to admission, the return may state that fact, and aver that

¹ *Rex v. Ward*, Fitzg. 195; *Rex v. Harwood*, 2 Ld. Raymd. 1045; *Wright v. Fawcett*, 4 Burr. 2044; Co. Lit. 381; *Manaton's Case*, T. Ray. 365; *Steven's Case*, T. Ray. 432; *Hereford's Case*, 1 Sid. 209; *Rex v. Cornwall*, 11 Mod. 174; *Rex v. Lambert*, 12 Mod. 3; S. C. Carth. 170; *Rex v. Chester*, 5 Mod. 11.

² *Rex v. Lyme Regis*, Doug. 84; *Willcock on Mun. Corp.* 413.

³ *Rex v. York*, 5 T. R. 76; *Rex v. Malden*, 1 Ld. Raymd. 481; S. C. 2 Salk. 431; *Rex v. Abingdon*, 1 Ld. Raymd. 560; S. C. 2 Salk. 432; *Rex v. Ludlow*, 8 Mod. 270; *Rex v. Whiskin*, Andr. 3.

⁴ *Rex v. York*, 5 T. R. 74, 75.

⁵ *Rex v. Clapham*, 1 Vent. 111; *Rex v. Penrice*, 1235.

⁶ *Rex v. Clapham*, 1 Vent. 111.

he has not been approved,¹ or that he has not paid the fine.² Where certain days are appointed for admission to a corporation, and no person is admissible at any other time, the return to a mandamus to admit may show this, and if it negative the right to be admitted at any other time, it will be sufficient.³ A return to a mandamus to admit, that the office is already full, is insufficient; for if the prosecutor has the prior title, the possessor is merely an officer *de facto*; and if the title of the possessor is good, the return should show that.⁴

Ouster in *quo warranto*, outlawry,⁵ or that the prosecutor in due manner resigned his office,⁶ are good returns to a mandamus to restore; and in the latter case, though a deed is necessary to the resignation, that the resignation was by deed will be implied in the general averment, as a legal requisite.⁷ It is an insufficient averment of a resignation, that the prosecutor had consented to be turned out; it should be more certain, as that the prosecutor resigned.⁸ Where, however, the resignation is by mere implication, as by the acceptance of an incompatible office, a general averment of resignation is insufficient; but the return must show the particulars.⁹ The return need not show the authority of the whole body, or a select class, to accept a resignation; for with either this authority is incidental to the right of appointment.¹⁰ In every case of amotion or disfranchisement, the return should show precisely the cause of the same, and the proceedings had; as, that an assembly of the proper persons was duly held, notice given to the prosecutor, a conviction of an offence, and an actual amotion or disfranchisement thereupon, in order that the court

¹ Wright v. Fawcett, 4 Burr. 2044.

² Taverner's Case, T. Ray. 447.

³ Rex v. Whiskin, Andr. 3.

⁴ Rex v. Ward, Fitzg. 195.

⁵ Rex v. Bristol, 1 Show. 288.

⁶ Rex v. Rippon, 1 Ld. Raymd. 563; S. C. 2 Salk. 432.

⁷ Ibid.

⁸ Reg. v. Lane, 2 Ld. Raymd. 1304; S. C. 11 Mod. 270; S. C. Fortesc. 275.

⁹ Verrior v. Sandwich, 1 Sid. 303.

¹⁰ Rex v. Tidderley, 1 Sid. 14.

may judge of the legality of the cause, and the regularity of the proceedings. Accordingly, if the return merely allege, that the prosecutor was duly removed or expelled the corporation for a violation of duty, without specifying the charges upon which he was convicted, or "the manner of proceeding, it is insufficient."¹

If, however, the officer is an officer at the will of the corporation, the return should state that circumstance, and that he was duly removed on the determination of their pleasure, without assigning any other cause;² for if they allow it to appear, that he has a permanent right to his office, and set forth an insufficient cause of amotion, he will be entitled to a peremptory writ for his restoration.³ In general, any causes of amotion duly set forth in the return are good answers to the writ for restoration.⁴ The acts, however, constituting the cause of amotion must be specifically set forth, and such general allegations as these, "for removing servants of the corporation, who ought only to be displaced by the common council," or, "that the prosecutor has been guilty of general neglect and omission of duty in his office," without stating particular instances of neglect or omission, are insufficient.⁵ And where the rules of a religious society inflicted the penalty of expulsion on any member, who should commence a suit at law against another member, "except the case were of such a nature as to require and justify a process at law," a return to a mandamus to restore a member to his standing, which set forth the rule, and that the expelled member had commenced a suit at law against another member, without averring, that the case was not

¹ *Rex v. Doncaster*, Sel. N. P. 1052; *Bruce's Case*, 2 Stra. 819; *Rex v. Abingdon*, 2 Salk. 432; *Bagg's Case*, 11 Co. 99; *Rex v. Liverpool*, 2 Burr. 731, 732; S. C. 2 Kenyon, 431; *The Commonwealth v. The Guardians of the Poor of the City of Philadelphia*, 6 Serg. & Rawle, (Penn.) R. 469, per Duncan, J.

² *Rex v. Thame*, 1 Stra. 115; *Dighton's Case*, 1 Vent. 77, 82.

³ *Rex v. Campion*, 1 Sid. 14; *Rex v. Ipswich*, 2 Ld. Raymd. 1240; *Rex v. Oxon*, 2 Salk. 428.

⁴ For causes of amotion, see Chap. XII.

⁵ *Rex v. Wilton*, 5 Mod. 259; S. C. 12 Mod. 113; *Rex v. York*, 2 Ld. Raymd. 1566; *Rex v. Doncaster*, Sayer, 39.

of such a nature as to require and justify a process at law, was held to be insufficient.¹ Where, however, the constitution of the corporation required the officer to be learned in the laws of the land, a general return, that he was not learned in the laws of the land, was adjudged sufficient; “for, said Kelyng, chief justice, if he was learned in the laws of the land, he might have cause for the false return, and, if it was found for him, he should be restored.”² It is held, that a man cannot be removed from one office for misconduct in another; and the return should show by express statement, or necessary implication, that the prosecutor had misbehaved in the office, from which he was removed.³ If the power of amotion be in the body at large, it is unnecessary to set it forth in the return, since the law implies it;⁴ but a return to a mandamus to restore an expelled member or officer, that he was tried and expelled by a select body or number, without showing by what authority this select body or number acted, is insufficient.⁵ Where it was shown that the power of amotion was in the mayor and aldermen and such burgesses as had been aldermen, it was held sufficient to allege in the return, that the amotion was by the mayor and burgesses, *according to the charter*.⁶

In the *King v. Shrewsbury*,⁷ where the return stated the amotion to have been made, “at a meeting of the mayor and the major part of the aldermen and common council *duly assembled*,” upon its being objected, that, inasmuch as this was not the common and ordinary business of the corporation to be done by

¹ *Green v. African Methodist Episcopal Society*, 1 Serg. & Rawle, (Penn.) R. 254.

² *Rex v. Lord Hawles*, 1 Vent. 145; S. C. 2 Keb. 770, 778, 796; S. C. cited *Rex v. Coventry*, 1 Ld. Raymd. 391, per Holt, C. J.

³ *Rex v. York*, 2 Ld. Raymd. 1566; *Rex v. Lyme Regis*, Doug. 177, 181.

⁴ *Rex v. Lyme Regis*, Doug. 153, 154; *Braithwaite's Case*, 1 Vent. 19.

⁵ *Rex v. York*, 2 Ld. Raymd. 1566; *Symmers v. Regem. Cowp.* 503; *Rex v. Feversham*, 8 T. R. 356; *Rex v. Lyme Regis*, Doug. 153; *Rex v. Cambridge*, Fort. 203; S. C. 2 Ld. Raymd. 1346; *Green v. African Methodist Episcopal Society*, 1 Serg. & Rawle, (Penn.) R. 254.

⁶ *Rex v. Feversham*, 8 T. R. 356; *Braithwaite's Case*, 1 Vent. 19; *Rex v. Doncaster*, Sayer, 37; S. C. B. N. P. 205.

⁷ 7 Mod. 202, 203.

charter on a particular day, the return should state *a general summons of all the resident members*, Lord Hardwicke, with whom the court concurred, held, that the words "*duly assembled*" were sufficient, and that the special manner of summoning, &c. would come in evidence. In *Rex v. Liverpool*,¹ however, it was subsequently adjudged by the Court of King's Bench, that if a select number of the corporation have power to amove, and do amove *on a day not directed by the charter*, all that are within summons must be summoned; and that, in such case, it is not sufficient to allege in the return, "that they were *duly*, or *in due manner*, met and assembled;" but it should be expressly alleged, "that they were *all summoned*." Where the power of amotion was vested in "the mayor, aldermen, and common council assembled," an allegation according to the legal effect, that "the mayor and major part of the aldermen, &c." assembled, &c. was considered sufficient.² If the officer is entitled to it, the return must specifically aver notice to him to appear and defend himself, or must show that the corporation did what they could to summon him.³ This averment of summons is sufficiently made by "we caused to be summoned, &c;" but not by "we commanded the proper officer to summon him,"⁴ nor under a recital, as, "although he was summoned."⁵ If the return show a total desertion of the municipality, and it does not appear, that the officer subsequently returned to it,⁶ or if it show that the prosecutor actually appeared and defended himself,⁷ no previous summons need

¹ 2 Burr. 731, &c.

² *Rex v. Shrewsbury*, 7 Mod. 203; Hardwicke. C. J. dubitante.

³ *Rex v. King's Lynn*, Cunnigh. 98; *Rex v. Cambridge*, Fort. 206; S. C. 2 Ld. Raymd. 1348; *Rex v. Gaskin*, 8 T. R. 209; *Commonwealth v. Pennsylvania Beneficial Institution*, 2 Serg. & Rawle, (Penn.) R. 141; see Chap. XII. § 4.

⁴ *Braithwaite's Case*, 1 Vent. 19.

⁵ *Commonwealth v. Pennsylvania Beneficial Institution*, 2 Serg. & Rawle, (Penn.) R. 141.

⁶ *Rex v. Exon*. 1 Show. 365; S. C. *Rex v. Glyde*, 12 Mod. 28; S. C. 4 Mod. 36.

⁷ *Rex v. Chalke*, 1 Ld. Raymd. 225; *Rex v. Wilton*, 2 Salk. 428; *Rex v. Gaskin*, 8 T. R. 209; *Commonwealth v. Pennsylvania Beneficial Institution*, 2 Serg. & Rawle, (Penn.) R. 141.

be alleged. The return must also state specifically the charges, that were made against the prosecutor as grounds for his amotion,¹ and that they were either proved on oath, or confessed.² If it be necessary, that the amotion should be under the corporate seal, or be entered on the corporation books, it is not necessary to aver that it was so done ; for this will be implied in the general averment, that he was amoved.³ Where a return to a mandamus to restore a common-council-man averred, "that they were chosen yearly, and that before the coming of the writ they were chosen and continued for a year, and at the end of the year were duly amoved from their offices by the election of others," it was held bad for its uncertainty ; for it should have shown the time when they were elected, so that it might have appeared, that they were not amoved before the expiration of their year.⁴ It is held, that in case of an officer at pleasure, a new election is an actual amotion ; and hence that a return to a mandamus to restore such an officer, that he was only an officer at pleasure, and that upon due summons to choose another, they did choose another, and *thereby* the former was removed, was not objectionable for argumentativeness.⁵ The return, "not amoved by us," has been held sufficient.⁶ It is a good return to a mandamus requiring books and papers to be delivered up, to say, "that on and since the teste of the writ, A. had not, nor has had the books, &c., or any of them, in his custody, power, or possession ;" and if it is unnecessarily stated by him, that he had them not on a prior day, he is not bound to negative

¹ *Rex v. Carlisle*, 8 Mod. 103 ; S. C. Fort. 200 ; *The Commonwealth v. The Guardians of the Poor of the City of Philadelphia*, 6 Serg. & Rawle, (Penn.) R. 469.

² *Rex v. Carlisle*, 8 Mod. 99 ; *Rex v. Wilton*, 5 Mod. 258 ; S. C. 2 Salk. 428 ; *Rex v. Feversham*, 8 T. R. 356.

³ *Rex v. Chalke*, 1 Ld. Raymd. 226 ; S. C. 5 Mod. 258 ; *Willcock on Mun. Corp.* 423.

⁴ *Rex v. Chester*, 5 Mod. 11.

⁵ *Rex v. Canterbury*, 11 Mod. 404 ; S. C. 1 Str. 674 ; *Rex v. Thame*, 1 Str. 115.

⁶ *Lucas v. Colchester*, in *Hereford's Case*, 1 Sid. 210.

a possession intermediate between that day and the teste of the writ.¹

§ 9. In England, by statute 9th of Anne, it is made lawful for persons prosecuting writs of mandamus to plead to or traverse any of the material facts contained in the return. Before that statute, if the return was sufficient in law, but false in fact, it could not be called in question in the proceeding in which it was made, any more than the ordinary return of a sheriff; but, if the public were concerned, the remedy was by criminal information;² if an individual was the party more particularly interested, his only remedy was an action on the case for a false return.³

In this country, unless the statute of Anne, or some similar statute, has been adopted or enacted, the only remedy for the prosecutor, if the return be false, is an action against him or those who have made the false return.⁴ If the facts stated in the return necessarily imply what is false, an action lies as well as if the return stated an express falsehood. Thus, a corporation set forth in a return their charter, and as no special power of motion was given thereby to the whole body, or any select part, the implication was that his power was vested in the whole body. Lord Mansfield considered, that if there were another charter, or

¹ *Rex v. Round*, 1 Nev. & M. 427; 1 Har. & Woll. 546.

² *Rex v. Spotland*, C. T. H. 185; *Rex v. Surgeons*, 1 Salk. 374; *Rex v. Abingdon*, 2 Salk. 431, 432; S. C. 12 Mod. 309; S. C. Carth. 499; *Anon.* 12 Mod. 559; *Rex v. Pettward*, 4 Burr. 2453; *Rex v. Williamson*, 3 B. & A. 583; *Rex v. Barou*, 3 B. & A. 434; *Rex v. Lancaster*, 1 D. & R. 485. On the information, if judgment goes against the defendants for falsity of the return, they will be fined, and a peremptory mandamus awarded against them. *Rex v. Surgeons*, 1 Salk. 374; *Rex v. Abingdon*, 2 Salk. 431, 432; S. C. 12 Mod. 308.

³ *Manaton's Case*, T. Ray. 365; *Turner's Case*, 4 Sid. 257; *Bagg's Case*, 11 Co. 99, b.; *Kynaston v. Shrewsbury*, 2 Str. 1053; *Rich v. Pilkington*, Carth. 171; *Bul. N. P.* 204; *Howard v. Gage*, 6 Mass. R. 462.

⁴ *Howard v. Gage*, 6 Mass. R. 462. In New York, by statute, the person prosecuting the writ, may demur or plead to such of the facts contained in the return as he thinks proper. 1 R. L. 107, § 2; 2 R. S. 586, § 55; *The People v. The Commissioners of Hudson*, 6 Wend. (N. Y.) R. 559.

by-law restraining this power to a select class, and that were not set out, there could be no doubt but an action would lie ; inasmuch as this would be misleading the court.¹ And though a return be true in words, if it be false in substance, an action lies.² In an action for a false return, it is said to be immaterial, whether the mandamus ought originally to have been granted, or not ; at least, after a plea affirming the truth of the return, says Mr. Willcock, it shall be taken *pro confesso*, that the writ was granted and the return made by the defendant.³ In England, judgment upon the sufficiency of the return to the mandamus must be actually entered upon the record, before the action for a false return can be commenced.⁴ To obtain by it, too, a peremptory writ, it should be brought in the court of King's Bench ; inasmuch as that court will not take judicial notice of a judgment in the Common Pleas, and the peremptory writ commences with a statement, that the return is false, *prout constat nobis per recordum*.⁵ It seems, however, that where in an action for a false return, judgment was given for the defendant, and upon writ of error, judgment was reversed in the Exchequer Chamber, the court of King's Bench granted a peremptory mandamus, before judgment was entered, saying, it was a mandatory writ, and not a judicial writ founded on the record.⁶ Where there are several joint prosecutors of a writ of mandamus, the action for a false return must be brought by them, or the survivors of them, jointly ; for the peremptory mandamus, which issues on judgment that the return is false, must pursue the form of the writ in the action for the false return, and cannot be granted to one without the rest.⁷ If

¹ *Rex v. Lyne Regis*, 1 Doug. 158.

² *Braithwaite's Case*, 1 Vent. 19 ; *Rex v. Lyne Regis*, 1 Doug. 159, per Buller, J.

³ *Green v. Pope*, 1 Ld. Ray. 126 ; Willcock on Mun. Corp. 438.

⁴ *Enfield v. Hills*, 2 Lev. 239 ; S. C. T. Jones, 116.

⁵ *Green v. Pope*, 1 Ld. Ray. 128 ; S. C. Skin. 670 ; Anon. 2 Salk. 428 ; *Foot v. Prowse*, 2 Str. 698.

⁶ Bul. N. P. 202.

⁷ *Ward v. Brampston*, 3 Lev. 362 ; *Green v. Pope*, 1 Ld. Raym. 128 ; *Rex v. Andover*, 2 Salk. 433 ; S. C. 12 Mod. 332 ; *Butler v. Kews*, 12 Mod.

the false return be made by several, the action may be brought against them jointly or severally, as on any other tort.¹ And though the return be made in the name of the corporation, the action may be brought against the particular person or persons who caused it to be made.² In such case, however, if the defendant should prove that the return was made contrary to his will, but that he was overruled by a majority, this would be good evidence under the general issue, not guilty, and the plaintiff will be non-suited.³ The declaration in an action for a false return need not allege that it was the duty of the defendant to obey the mandamus; for this is admitted by his alleging in the return a reason for his not obeying the writ.⁴ It must, however, aver that the return was made by the defendant; and proof, that the mandamus was delivered to the head officer of a corporation, and has a return made upon it, is *prima facie* evidence that he made it.⁵ Proof, that the defendant was served personally with an alias mandamus, and told the person who served him with the writ, "that he should take care that a return was made to it," and farther, that two rules of court were made, one, for an attachment against the defendant for not making a return, and the other, to discharge that rule upon paying the costs, and appearing, &c. was held sufficient proof that the defendant made the return.⁶ The declaration sets forth the return with sufficient certainty, if it set forth that it was made, "*modo et forma sequenti.*"⁷ In an action for a false return to a mandamus to admit, it was held immaterial on what day the plaintiff laid his election, so that it was before action brought; but that where there is a customary

349; *Rex v. Montacute*, 1 Wm. Blacks. 60; Willcock on Mun. Cor. 439, 440.

¹ *Rich v. Pilkington*, Carth. 171, 172.

² *Enfield v. Hills*, T. Jones, 116; S. C. 2 Lev. 239; *Rex v. Rippon*, 1 Ld. Raym. 564; S. C. Comyns, 86; *Reg. v. Chalice*, 2 Ld. Raym. 849; *Rich v. Pilkington*, Carth. 171; *Vaughan v. Lewis*, Carth. 229.

³ *Rich v. Pilkington*, Carth. 172.

⁴ *Mayor of Norwich's case*, 12 Mod. 322.

⁵ *Reg. v. Chalice*, 2 Ld. Raym. 849.

⁶ *Vaughan v. Lewis*, Carth. 229.

⁷ *Pullen v. Palmer*, 1 Ld. Raymd. 496; *Rex v. Powell*, 2 Wm. Black. 787.

day of election, if the plaintiff does not prove his election on that day, though he has laid it right, yet he must fail.¹ The action for a false return is local, but the venue may be laid either in the county where the return was made, or that in which it appears of record.² Where the return to a mandamus is that the prosecutor was not elected, the plaintiff in his action must falsify the return by showing his own title.³

§ 10. On application for a mandamus, where both parties have been fully heard, and there is no dispute about facts, the court will, if perfectly satisfied, without going through the forms of an alternative mandamus, grant a peremptory mandamus in the first instance.⁴ Where, however, a rule for a peremptory mandamus has, in such case, been obtained, the court will sometimes vacate the rule, and grant one for an alternative mandamus only, so as to bring the question more fully and solemnly before them on the return.⁵ The court will not, however, award a peremptory mandamus on a part of the record, whilst proceedings on the first mandamus are incomplete.⁶ Upon the return of an alternative mandamus, if the return be disallowed as insufficient in law, or inconsistent with itself, the court will grant a peremptory writ,

¹ *Vaughan v. Lewis*, Carth. 228.

² *Lord v. Francis*, 12 Mod. 408; *Russel v. Succelen*, 1 Sid. 218; *Rex v. Oxford*, 2 Salk. 669; *Cameron v. Gray*, 6 T. R. 363; *Rex v. Newcastle*, 1 East. 116.

³ *Crawford v. Powell*, 2 Burr. 1013; S. C. 1 Wm. Black. 229; *Willcock on Mun. Corp.* 442.

⁴ *Ex parte Jennings*, 6 Cow. (N. Y.) R. 229; *Ex parte Rogers*, 7 Cow. (N. Y.) R. 526, 533, 534; *The People v. Throop*, 12 Wend. (N. Y.) R. 183; *Commonwealth v. President, Managers, and Company of the Anderson Ferry, Waterford, and New Haven Turnpike Road*, 7 Serg. & Rawle, (Penn.) R. 6. For form of rule for peremptory mandamus, see *Ex parte Jennings*, 6 Cow. (N. Y.) R. 529. The rule for a peremptory mandamus may, if the court please, be granted nisi, so as to allow them time for advisement; and if they do not alter their opinion in the course of the same term, the writ issues. *Rex v. Tappenden*, 3 East, 192.

⁵ *Ex parte Jennings*, 6 Cow. (N. Y.) R. 529, 535, 536, where see form of rule for peremptory mandamus.

⁶ *Reg. v. Baldwin*, 8 Adolph. & Ellis, 947; 3 Perr. & Dav. 124.

to which, as its name implies, the only answer is implicit obedience.¹ And on motion for a peremptory mandamus, the court do not look at the affidavits on which the alternative writ was founded ; but to the return to the alternative writ.² Yet, notwithstanding the insufficiency of the return, if it appear that the applicant ought not to have the writ ; as, if on a mandamus to restore, it seems, that though irregularly amoved, he may, upon restoration, be immediately amoved for a sufficient cause, the court will not grant the peremptory writ.³ But if, however, they have merely the *power* to amove again, as in case of an officer at pleasure, and it be not incumbent upon them as a duty to exercise it, the peremptory writ may, it seems, be granted.⁴ This writ is issued, too, upon judgment for the plaintiff in an action for a false return to an alternative mandamus, if the action be brought in the same court,⁵ though it be carried up by writ of error, and judgment affirmed in the court above.⁶ Neither a bill of exceptions, nor a writ of error in the action for a false return delays the issuing of the peremptory writ ;⁷ though it seems that a motion for a new trial stays the writ until the motion is disposed of.⁸

¹ Stevens' Case, T. Ray. 432 ; Rex v. Cambridge, Fortes. 205 ; Rex v. Norwich, 2 Ld. Raymd. 1245 ; Rex v. Ilchester, 4 D. & R. 329 ; The People v. Seymour, 6 Cow. (N. Y.) R. 579. And in England, where the return is not void on the face of it, the court will not allow its validity to be questioned by motion to take it off the file upon affidavit ; it can only be discussed on a *concilium* in the regular way. Rex v. Payne, 3 Nev. & P. (Q. B.) 165.

² The People v. Hudson & Stuyvesant, 7 Wend. (N. Y.) R. 474.

³ Rex v. Campion, 1 Sid. 14 ; Rex v. Axbridge, Cowp. 523 ; Rex v. Griffiths, 1 D. & R. 390 ; S. C. 5 B. & A. 735 ; Commercial Bank of Albany v. Canal Co., 10 Wend. (N. Y.) R. 25.

⁴ Protector et Rex v. Campion, 2 Sid. 97, 1 Sid. 14 ; Rex v. Oxon. 2 Salk. 429 ; Rex v. Slatford, 5 Mod. 316 ; Reg. v. Ipswich, 2 Ld. Raymd. 1240.

⁵ Buckley v. Palmer, 2 Salk. 431 ; Green v. Pope, 1 Ld. Raymd. 128 ; S. C. Skin. 670 ; Anon. but S. C. 2 Salk. 428 ; Foot v. Prowse, 2 Str. 698.

⁶ B. N. P. 202 ; Foot v. Prowse, 2 Str. 698 ; see Rex v. Amery, 1 Anstr. 183.

⁷ Wright v. Sharp, 11 Mod. 175 ; B. N. P. 200.

⁸ Ibid. ; Dublin v. Dowgate, 1 P. Wms. 350 ; contra Ruding v. Newel, 2 Str. 983.

A return to a writ of mandamus was allowed to be awarded by the Supreme Court of Massachusetts, after exceptions to it had been filed.¹ Though the direction of the alternative mandamus was erroneous, the peremptory writ founded upon, and issuing to enforce it, must be directed in the same manner; and by their return to the substance of the alternative, the defendants are precluded from objecting to the direction of the peremptory writ.² In case of an officer restored by peremptory writ for *irregularity* of the motion, and insufficiency of the cause alleged, it was held, that the writ was obeyed, though the corporation summoned him to show cause why he should not be removed, at the same time that they restored him, and in pursuance thereof removed him for the same, or nearly the same offences.³ If the writ is not effectually obeyed, the prosecutor may object to the filing of the return.⁴ Where it was proved that a peremptory mandamus was unfairly obtained, the court set it aside on motion.⁵

§ 11. If the defendant neglects to make a return to a writ of mandamus, an attachment issues against him, under which the court punish the contempt, and enforce obedience to their writ. If the defendant in such case be a corporation, the attachment issues only against the persons guilty of the contempt in their natural capacity.⁶ If the mandamus is directed to several in their natural capacity, unless all join in making the return, the attachment for disobedience must issue against all, whether guilty or not, though when they are before the court, their punishment will be proportioned to their offences.⁷ Where no return was made to a mandamus, because the parties to whom it was directed could not agree on a return, inasmuch as they disagreed as to

¹ *Springfield v. Commissioners of Hampden*, 10 Pick. (Mass.) R. 59.

² *Reg. v. Ipswich*, 2 Ld. Raymd. 1240.

³ *Reg. v. Ipswich*, 2 Ld. Raymd. 1240; *Bagg's Case*, 11 R. 99, b.

⁴ *Reg. v. Ipswich*, 2 Ld. Raymd. 1283.

⁵ *The People v. Everitt*, 1 Caines, (N. Y.) R. 8.

⁶ *Mill's Case*, T. Ray. 152.

⁷ *Case of the Bailiffs of Bridgenorth*, 2 Str. 808; *Rex v. Salop*. Bul. N. P. 201, 202; *New Sarum*, Comb. 327.

certain rights under the charter, a decision upon which was involved in the return to be made ; the court, instead of granting an attachment, allowed the parties to enter into a rule to try their right under a feigned issue, whether the prosecutor was or was not elected.¹ An attachment issues after a peremptory rule to return the first writ,² or for a neglect to return a peremptory writ on the day assigned,³ or for neglecting to make a return to the *pluries* ;⁴ but not for neglecting to make a return to the first writ on the day assigned.⁵ So it is granted if a frivolous return is made, or if, when the writ is directed to the head officer, and also to the corporation, he makes a return contrary to the consent of the corporation.⁶ The application for an attachment is made by a motion for a rule *nisi*, founded on affidavits, upon which the defendant may show cause, unless the contempt be gross, when the rule is made absolute at first.⁷ Where the peremptory writ was directed to a corporation, an attachment was granted upon proof of a personal service upon the town clerk alone.⁸ And in *The King v. Tooley*,⁹ upon affidavit that the defendant had kept out of the way, so that personal service of a peremptory writ could not be made upon him, and that the writ had been left at his house, the court ordered him to show cause. If a mandamus is served upon all those to whom it is directed, and a motion for an attachment against all of them is made, it is sufficient to produce an affidavit of service of the writ at the time of showing cause upon the attachment ; nor is even this necessary, unless required by the other side. But if the writ were served upon some of the members only, and the attachment

¹ *Rex v. Rye*, 2 Burr. 798.

² *Coventry Case*, 2 Salk. 429 ; *Anon. Ib.* 434 ; *Anon. Comb.* 234.

³ *Rex v. Fowey*, 5 D. & R. 614.

⁴ *Coventry Case*, 2 Salk. 429 ; *Anon.* 2 Salk. 434.

⁵ *Ibid.* ; *Anon. Comb.* 234.

⁶ *Rex v. Robinson*, 8 Mod. 336 ; *Rex v. Hoskins*, C. T. H. 186 ; *Rex v. Abingdon*, 12 Mod. 308.

⁷ *Tidd's Prac.* 484 ; *Chaunt v. Smart*, 1 Bos. & Pul. 477.

⁸ *Rex v. Fowey*, 5 D. & R. 614.

⁹ 12 Mod. 312.

is moved against them alone, they ought, it seems, to have an opportunity of answering the affidavit of the special service of the writ.¹ Lord Holt says, that there are "two sorts of attachments upon a mandatory writ; the one entitles the party to his action for damages, and that must be upon the *pluries*; and the other punishes the contempt, which may be upon the *alias*."²

¹ *Rex v. Esham*, 2 Barnard, 265.

² *Anon.* 12 Mod. 348; *Anon.* 12 Mod. 164.

CHAPTER XXI.

OF INFORMATIONS IN THE NATURE OF QUO WARRANTO.

§ 1. As by the feudal law the king was the source of all public franchises, the method of proceeding against those who exercised them without, or inconsistently with his grant, was in his name, under the direction of his attorney general. Anciently, this method was by the original writ of *quo warranto*, called the king's writ of right for franchises and liberties, which commanded the sheriff of the county, to summon the defendant to be at such a place before the king at his next coming into the county, or before the justices itinerant at the next assize, "when they should come into those parts," to show, "*quo warranto*," "by what warrant," he claimed the franchises mentioned in the writ. This writ has now become obsolete; but it is the origin of informations in the nature of *quo warranto* at the common law, filed in England by the King's attorney general of his own authority, or by the King's coroner, commonly called the master of the crown office, *formerly* of his own authority, but since the statute 4 and 5 of Wm. & Mary, c. 18, under sanction of the Court of King's Bench.¹

Informations in the nature of a *quo warranto* are, in England, of three kinds. The first is an information filed by the attorney general of his own authority; the second an information filed by the King's coroner, or the master of the crown office, under the direction of the court, in the exercise of its common law jurisdiction; and the third a similar information by leave of the court, in pursuance of the statute of Anne, c. 20. 2, 4. This last species

¹ Stat. *quo warranto*, 6 Ed. 1, § 5; 18 Ed. 1, *stats.* 2, 3; *Strata Marcella*, 9 Co. 29; *Rex v. Trinity House*, 1 Sid. 86; *Rex v. Trelawney*, 3 Burr. 1616; 2 Kyd on Corp. 395, 403, 411; Willcock on Mun. Corp. 453; 2 Sel. N. P. (Wheat's ed.) 872, 873; *State v. Ashley*, 1 Pike, (Arkan.) R. 279.

of information is the one usually employed, in England, in cases where corporations of a municipal character are concerned ; and its object, mode of issuing, and general requisites will be best understood by a reference to the statute by which it was authorized. By this statute it was enacted, that, " if any person or persons shall usurp or intrude into, or unlawfully hold and execute, the offices, of mayors, bailiffs, portreeves, or other officers, or the franchises of burgesses or freemen in any city, town corporate, borough, or place within England or Wales, it shall be lawful for the proper officer of the Court of Queen's Bench, the courts of sessions of counties palatine, and the courts of grand sessions in Wales, with the leave of the said courts respectively, to exhibit one or more information or informations, in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations, to be the relator or relators, against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner, as is usual in cases of information in the nature of *quo warranto*." ¹

In our own country, informations in the nature of *quo warranto* are filed in the highest courts of ordinary jurisdiction in several of the States, ² either by the attorney general of his own authority, or by the prosecutor who is entitled *pro forma* to use his name, ³ as the case may be. The Supreme Court of Arkansas, however, has decided that that court has no jurisdiction over an information in the nature of a *quo warranto*, under that clause of their constitution, which authorizes the court to issue writs of *quo warranto*, on the ground that the former is a criminal, and the latter a civil proceeding, and that the power "to issue other remedial writs,

¹ 9 Anne, c. 20, § 4 ; and see it in Willcock on Mun. Corp. 460, 461.

² 4 Cow. (N. Y.) R. 102, n. a. ; The People v. Richardson, 6 Cow. (N. Y.) R. 102, n. ; Commonwealth v. Fowler, 10 Mass. R. 290 ; Respublica v. Griffiths, 2 Dallas, (Penn.) R. 112 ; The State v. Foster, 2 Halst. (N. J.) R. 101 ; The State v. the City Council of Charleston, 1 Rep. Const. Ct. (S. C.) 36.

³ Respublica v. Griffiths, 2 Dall. R. 112.

granted by the constitution, embraces only such writs, other than those specifically enumerated, as may be properly used in the exercise of appellate powers, or of the power of control over inferior, or other courts, expressly granted by the constitution."¹

At common law, strictly speaking, no such person as a relator to an information is known;² he being altogether a creature of statute. But the courts in this country, even where no statute similar to that of Anne prevails, allow, in their discretion, informations to be filed by private persons desirous to try their rights, in the name of the attorney general;³ and these are commonly called relators;⁴ though no judgment for costs can be rendered for or against them.⁵ Though in form these informations are criminal, in their nature they are but civil proceedings;⁶ and hence, it was decided in Pennsylvania, that they did not fall within the prohibition of the tenth section of the ninth article of the constitution of that State, which declares, "that no person shall, for any indictable offence, be proceeded against criminally by information;" the court observing, "that the constitution refers to informations, as a form of prosecution, to punish an offender, without the intervention of a grand jury; whereas, an information in the nature of a writ of *quo warranto* is applied to the mere purposes of trying a civil right, and ousting the wrongful possessor of an office."⁷ For the same reason, it was decided in Indiana, that

¹ State v. Ashley, 1 Pike, (Arkan.) R. 279.

² Bull. N. P. 211; Sel. N. P. (Wheat's ed.) 874, n. 4; The Commonwealth v. Woelper et al. 3 Serg. & Rawle, (Penn.) R. 52; The Commonwealth v. Arrison et al. 15 Serg. & Rawle, (Penn.) R. 127, and cases there cited. The mention of a relator is, however, no more than surplusage. Rex v. Williams, 1 Burr. 408, per Dennison, J.

³ Respublica v. Griffiths, 2 Dallas, (Penn.) R. 112, 113; Commonwealth v. The Union Ins. Co. in Newburyport, 5 Mass. R. 231, 232.

⁴ The Commonwealth on the relation of Clements v. Arrison et al. 15 Serg. & Rawle, (Penn.) R. 127.

⁵ Rex v. Williams, 1 Burr. 407, 408, 409; Commonwealth v. Woelper et al. 3 Serg. & Rawle, (Penn.) R. 52.

⁶ Rex v. Francis, 3 T. R. 484; 2 Kyd on Corp. 439.

⁷ Respublica v. Wray, 3 Dallas, (Penn.) R. 490, 491, per Shippen, J.; Commonwealth v. Brown, 1 Serg. & Rawle, (Penn.) R. 385, per Tilghman, C. J.

the twelfth section of the first article of the constitution of that State, "that no person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment," does not prohibit a *quo warranto* information.¹

§ 2. In England, the crown has at all times a right to inquire into claims to any office or franchise, and to remove the parties, unless they can show a complete legal title thereto.² In prosecution of this right, the attorney general may of his own authority, and without any application to the court for leave,³ exhibit an information in the nature of a *quo warranto*, in the Court of King's Bench, against those who assume to act as a corporation, to compel them to show by what prescription, statute, or charter, they make title to the franchise; or against an individual who possesses a corporate office, or any other franchise, to compel him to show his right.⁴ The attorney general may also file an information against a body corporate in its corporate name, compelling it to show by what title it holds a franchise alleged to be usurped.⁵ Informations of this kind were filed in New York by the attorney general, in the Supreme Court of that State, against several corporations, alleging that they exercised banking privileges without authority from the legislature. The first of these cases was *The People v. Utica Insurance Company*.⁶ In this case it appeared, that application had been previously made,

¹ *Bank of Vincennes v. State*, 1 Blackf. (Ind.) R. 267.

² Per Yates, J., *Rex v. Dawes*, and *Rex v. Martin*; Opinion of Mr. J. Yates, quoted in *The King v. Clarke*, 1 East, 43.

³ Per Abbott, C. J., *The King v. Trevenen*, 2 B. & A. 482. In the *People v. Trustees of Geneva College*, 5 Wend. (N. Y.) R. 220, it is stated by Chief Justice Savage, that "an information in the nature of a *quo warranto* may also be filed by the attorney general, upon his own relation, *on leave granted*, against any corporate body, whenever it shall exercise any franchise or privilege not conferred upon it by law." If the leave of the court be necessary, in New York, to enable the attorney general to file such an information, the practice of that State differs in this particular from the English practice.

⁴ *The King v. Clarke*, 1 East, 43; *The King v. Trevenen*, 2 B. & A. 482.

⁵ *Rex v. Cusack*, 2 Rol. 115.

⁶ 15 Johns. (N. Y.) R. 358.

by the attorney general to chancery, for an injunction to restrain the company from usurping the franchise of banking, and violating the restraining act of the State of New York ; which application was rejected by the court for want of jurisdiction, because there was a complete and adequate remedy at law, by an information in the nature of a *quo warranto*.¹ An information in the nature of a *quo warranto* was then filed by the attorney general against the company in the Supreme Court, and judgment of ouster thereupon rendered against them.² In the subsequent cases of *The People v. Bank of Niagara*,³ *The People v. The Washington and Warren Bank*,⁴ and *The People v. The Bank of Hudson*,⁵ informations of the same kind were filed against several banks, alleging that they exercised banking powers without any warrant, grant, or charter, although the real question was, not whether banking powers had been conferred upon them by the legislature, but whether they had not forfeited their charters by misconduct. In these cases, the informations were filed against the corporations in their corporate names, charging them generally with usurpations ; and on the defendants setting out their charters of incorporation, and justifying under them, the attorney general replied the causes of forfeiture specially, and this was held to be no departure. Where, too, a college, incorporated and located in a particular place, established as a branch of the college a medical school in a place different from that in which the college was located, and claimed the right of granting the degree of doctor of medicine, and of granting and issuing diplomas of such degree, it was held, that the establishment of such school, the appointment of professors to take charge of the same, and the granting of degrees and diplomas was the usurpation of a franchise, for which

¹ *Attorney General v. Utica Ins. Co.* 2 Johns. (N. Y.) Ch. R. 371, 377 ; *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 378, 379.

² *Ibid.* 15 Johns. (N. Y.) R. 386, 395.

³ 6 Cowen, (N. Y.) R. 196, where see the forms of the information and of the pleadings thereto ; and see *Rex v. Amery*, 2 T. R. 515 ; *Case of City of London*, 3 Harg. St. Tr. 545 ; 1 Black. Comm. 485 ; 2 Kyd on Corp. 486, 487.

⁴ 6 Cowen, (N. Y.) R. 211.

⁵ 6 Cowen, (N. Y.) R. 217.

an information in the nature of a *quo warranto* might be filed against the college.¹ The attorney general may also file an information against a corporate officer, to compel him to show by what title he exercises a particular franchise, claimed in his official capacity ; as if the mayor of a city corporation assume a right to admit freemen, without the assent of the rest of the body corporate.² In all these cases, the attorney general acts *ex officio*, of his own authority, and at his own relation ;³ though it seems, that a statement in the information by the attorney general, that he filed it in compliance with the order of a branch of the government, as the house of representatives,⁴ or at the relation of any one,⁵ will be considered as surplusage, and will not vitiate the proceeding. A very important class of cases, in which the power of the courts is exercised over corporations, through informations in the nature of *quo warranto*, is that in which corporations have forfeited their charters, by non-user or mis-user.⁶ An information for the purpose of dissolving a corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the King, in England, exercised through his attorney general, and of the commonwealth, in this country, exercised by the legislature, or by the attorney or solicitor general.⁷ In *Commonwealth v. The Union Fire and Marine Insurance Company in Newburyport*,⁸ application was made on behalf of several mem-

¹ *The People v. The Trustees of Geneva College*, 5 Wend. (N. Y.) R. 211.

² *Rex v. Hertford*, 1 Salk. 374 ; S. C. 1 Ld. Raymd. 426.

³ *Rex v. Ogden*, 10 B. & C. 230.

⁴ *Commonwealth v. Fowler*, 10 Mass. R. 290, 293, 294, 295.

⁵ *The People v. The Trustees of Geneva College*, 5 Wend. (N. Y.) R. 220.

⁶ *State v. Mayor and Aldermen of Savannah*, R. M. Charlton, (Ga.) R. 342 ; *State v. Essex Bank*, 8 Vermont R. 489 ; *People v. Hudson Bank*, 6 Cow. (N. Y.) R. 217.

⁷ *Rex v. Ogden*, 10 B. & C. 230.

⁸ 5 Mass. R. 230 ; and see *Chester Glass Company v. Dewey*, 16 Mass. R. 94 ; *R. v. Carmarthen*, 1 W. Blacks. 187 ; S. C. 2 Burr. 869 ; *The President, &c. of the Kishacoquillas and Centre Turnp. Road Company v. McConaby*, 16 Serg. & Rawle, (Penn.) R. 144, 145, 146, per Duncan, J. ; *The Banks v. Poitiaux*, 3 Rand. (Va.) R. 142, per Green, J. ; *Vernon Society v. Hills*, 6

bers of the corporation, for a rule upon it, to show cause why the solicitor general should not be directed to file an information against it, that the company might be dissolved, and their corporate power adjudged void. The parties applying for the rule alleged, that the corporation had been guilty of malfeasance, in not requiring from the members payment of fifty per cent of their subscriptions, within a time limited by the statute of incorporation, and also in taking greater risks than were authorized by the terms of that statute. The court, however, refused the information ; and Mr. Chief Justice Parsons, delivering the opinion of the court, observed :—

“ In this case, the parties applying for the rule do not complain of any illegal election or admission of any officer or member of the corporation ; but the object of the application is, to obtain a judgment of forfeiture of the franchises of the corporation, and a seizure of them by the commonwealth.

“ We are well satisfied that a corporation, as well when created by charter under the seal of the commonwealth, as by a statute of the legislature, may, by nonfeasance or malfeasance, forfeit its franchises, and that by judgment on an information, the commonwealth may seize them. And if the allegations stated in the motion for the rule in this case were true, and the commonwealth had caused an information to be filed and prosecuted, for the purpose of seizing the corporate franchises for such malfeasance, judgment for those causes might have been rendered for the commonwealth.

“ But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general, acting under its direction, or *ex officio* in its behalf. For the commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created ; and we cannot give judgment for the seizure by the commonwealth of the franchises

Cowen, (N. Y.) R. 23 ; The Society, &c. v. Morris Canal and Banking Co., per Chan. Williamson, M. S. S. opinion cited Halsted, Dig. 93.

of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment.

“This distinction between informations in the nature of a *quo warranto*, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation is well settled, and upon sound principles of law.”

§ 3. In the reign of Queen Anne, a statute was passed in England, introducing a new and more convenient mode of proceeding on informations in the nature of a *quo warranto*, in cases of intrusion or usurpation into certain enumerated offices and franchises of municipal corporations.¹ It is said, however, that the power of the court of the king's bench in granting such informations is not founded upon this act; but that it was intended merely to regulate the proceedings in the cases mentioned in it.² In the State of New York, a similar statute has been enacted, though the words of it are much broader than the English, as to the kind of offices or franchises, for the usurpation of, or intrusion into which, the remedy is given.³ The English statute does not seem

¹ 9 Anne, c. 20, § 4; Bac. Abr. Information, D.; Willcock on Mun. Corp. 460. The first words of this statute are, “If any person or persons shall usurp, or intrude, or unlawfully hold and execute the offices of mayor, bailiffs, portreeves, or other officers, or the franchises of burgesses, or freemen, in any city, town, corporate borough, or place, within England or Wales, it shall be lawful for the proper officer,” &c. See Willcock *supra*.

² Bull. N. P. 211.

³ 1 R. L. (N. Y.) 108, § 4; 4 Cowen, (N. Y.) R. 101, n. a. The New York statute gives this proceeding against any person who shall usurp, intrude into, or unlawfully hold and execute any office, or franchise, within the State. Per Spencer, J., *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 386; and see act of that State, passed April 21, 1825; L. N. Y. 7 vol. 448, sess. 48, ch. 325; see Summary of same, 4 Cowen, (N. Y.) R. 122, 133. For 17 sec. see Wend. (N. Y.) R. 589, 590, n. The object of this act is to facilitate proceedings against incorporated companies, &c.; and by it the Supreme Court are authorized, upon the application of any person or persons, natural or corporate, aggrieved by, or who may complain of, any election or any proceedings, act, or matter, in or touching the same, to proceed in a summary way to hear the affidavits, proofs, &c., or otherwise to inquire into the cause of complaint, and to order a new election, or establish the elec-

to apply to the offices or franchises of private corporations aggregate; and if in England there be any remedy by information in cases of intrusion into, or usurpation of such offices or franchises, it must be, as in this country, by information in the nature of *quo warranto* at the common law. This, as we have before observed, is filed in England by the king's coroner, commonly called the master of the crown office, under the direction of the court of king's bench, on application by any subject, who shows that a public injury is done by the usurpation of franchises.

It is said by Mr. Willcock,¹ that "the court will not sanction this proceeding, *either when the franchise is not of a public character*, or the applicant appears to them in the light of one intermeddling unnecessarily with the affairs of others; in these cases they will leave him to inform the attorney general, who will use his own discretion as to filing the information." We find in the English books many cases, in which this information has been granted for intrusions into offices of municipal corporations, and offices of a public and important nature,² and also for usurpations

tion complained of, or declare the election complained of to be void, and to establish the election of others, &c. For decisions under this clause of the statute, see *Ex parte Holmes*, 5 Cowen, (N. Y.) R. 426; *Ex parte Desdoity*, 1 Wend. (N. Y.) R. 98. By the seventeenth section of this act, the attorney general, or any creditor of an incorporated bank, which is insolvent, and unable to pay its debts, or has violated any of the provisions of its incorporating act, may apply by petition to chancery; and that court may enjoin the company from exercising any of its franchises, and appoint a receiver, and distribute its property among its fair and honest creditors. For decisions under this section, see, In the matter of the Niagara Ins. Co. 1 Paige, (N. Y.) Ch. R. 258; *The Attorney General v. Bank of Columbia*, 1 Ibid. 511; *S. C. Bank of Columbia v. Attorney General*, 3 Wend. (N. Y.) R. 588; *Haxtun v. Bishop*, 3 Wend. (N. Y.) R. 13; *Lawrence v. Greenwich Fire Ins. Co.* 1 Paige, (N. Y.) Ch. R. 587.

¹ Willcock on Mun. Corp. 457.

² *Clifton's Cas.* 3 Leon. 235; *R. v. Medlicot*, 2 Barnard, 222; *R. v. Hullston*, 1 Stra. 621; *R. v. Bingham*, 2 East, 312; *R. v. Mein*, 3 T. R. 598, 599, n.; *R. v. Highmore*, 5 B. & A. 771; *S. C. 1 D. & R.* 442; *R. v. McKay*, 4 B. & C. 356; *R. v. Boyles*, 2 Ld. Raymd. 1560; *S. C. 2 Stra.* 836; *S. C. Fitzg.* 82; *R. v. Duke of Bedford*, 1 Barnard, 282; *R. v. Ragden, Cunningham.* 54; *Anon.* 1 Barnard, 279.

of franchises by officers of municipal corporations,¹ but none in which it has been granted, where the office or franchise of a mere private corporation was concerned. In Sir William Lowther's case, a motion for leave to file an information against Sir William Lowther, to show by what authority he had made and set up a warren, was denied; *because it was of a private nature*, and therefore proper to be prosecuted only in the name of the attorney general by information, if his majesty thought fit.² In *The King v. Hansell*,³ Lord Hardwicke informs us, that "the court, indeed, have themselves made this distinction, to grant informations for *public usurpations*; but if it is only of a *private franchise*, not concerning the government, as a *fair*, &c., the court has sometimes refused them, and directed an application to the attorney general." Lord Hardwicke, as has been observed by the learned Mr. Chief Justice Tilghman,⁴ does not here deny the *right* of the court to grant the information, but affirms it. Indeed, he speaks of the above distinction, as made by the court, rather than as founded in their legal right to grant informations in cases of this kind. The franchise of maintaining a bridge across a navigable river, and exacting toll, is a franchise of a public nature, and *quo warranto*, or an information in the nature of *quo warranto*, is an appropriate remedy for any person aggrieved by a non-compliance on the part of the grantee of the franchise with the condition of the grant, and may be filed at his relation.⁵ The question, whether an information in the nature of a *quo warranto* would lie against one, who intruded himself into an office of a private corporation, may, however, be considered as settled in this country. In *The Commonwealth v. Arrison and others*,⁶ it

¹ *R. v. Williams*, 1 Burr. 407; S. C. 2 Kenyon Cas. 75; *R. v. Hertford*, 1 Ld. Raymd. 426; S. C. 1 Salk. 374; Bul. N. P. 208; *R. v. Breton*, 4 Burr. 2261.

² *Sir William Lowther's Case*, 2 Ld. Raymd. 1409; S. C. Stra. 637.

³ *Cas. Temp. Hardwicke*, 247.

⁴ *The Commonwealth v. Arrison and others*, 15 Serg. & Rawle, (Penn.) R. 131.

⁵ *The People ex rel. Taylor v. Thompson*, 21 Wend. (N. Y.) R. 235; *Thompson v. People ex rel. Taylor*, 23 Wend. (N. Y.) R. 537.

⁶ 15 Serg. & Rawle, (Penn.) R. 127.

underwent a full and learned discussion before the Supreme Court of Pennsylvania. There, a rule was laid on the defendants, to show cause why an information in the nature of a writ of *quo warranto* should not be filed against them, for exercising the office of trustees of a church corporation. Their counsel objected that, the office exercised by the defendants was a mere private matter, in which the public had no concern, and therefore not the subject of an information. The court, however, after a full argument, and upon a review of all the authorities, decided that the information would lie. Tilghman, C. J., in delivering the opinion of the court, observed ; “ I find no instance of an information in nature of a *quo warranto* in England, except in a case of a usurpation of the king’s prerogative, or of one of his franchises, or where the public, or at least a considerable number of people, were interested. In England, the number of corporations is very small indeed, compared with the United States of America. Consequently, the quantity of that kind of business, which may be brought into our courts, will be much greater than theirs. But that alone is not a sufficient reason for rejecting it. We are now to decide a general question on the *right* of the court ; not on the expediency of exercising that right, either in the present, or any other case. Now, to establish it as a principle, that no information can be granted in cases of what the counsel call *private corporations*, might lead to very serious consequences. Perhaps it may be said, that banks, and turnpike, canal, and bridge companies, are of a *public* nature ; but yet they have no concern with the government of the country, or the administration of justice. They are no farther public, than as they have to do with great numbers of people. But if numbers alone be the criterion, it will often be difficult to distinguish public from private corporations. Let us consider *churches* for example. In some, the congregation is very numerous, in others, very small. How is the court to make the line of distinction ? If you say the court has the right, in both cases, to grant or deny the information, according to its opinion of the expediency, there is no difficulty as to the right. But if it be alleged, that there is a right in one case, and not in the other, the difficulty will be

extreme. I strongly incline to the opinion, that in all cases where a *charter* exists, and a question arises concerning *the exercise of an office claimed under that charter*, the court may, in its discretion, grant leave to file an information. Because, in all such cases, although it cannot be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed, has no claim but from the grant of the commonwealth and an unfounded claim is an usurpation, under pretence of a charter, of a right never granted.”¹ In the same State, in the previous cases of *The Commonwealth v. Woelper*,² and *The Commonwealth v. Cain and others*,³ an information was granted against the defendants, who were vestry-men of church corporations, without objection. In the *Commonwealth v. Murray*,⁴ the point was made; but the information was refused on another ground, viz. because the party who moved for it claimed in opposition to the charter under which the defendant held. In Massachusetts, in the case of *The Commonwealth v. The Union Fire and Marine Insurance Company in Newburyport*,⁵ Chief Justice Parsons in his opinion takes it for granted, that an information would lie in case of an illegal election, or admission of an officer or member of an insurance company; and in Ohio it was held to be the proper remedy to inquire by what authority a person holds the office of a bank director, to try the officer and arrest the usurper.⁶ In Arkansas also, though, as we have seen, the Supreme Court of that State have disclaimed any jurisdiction over informations in the nature of *quo warranto*, yet they hold that a writ of *quo warranto* will lie, to inquire by what authority one exercises the franchise and office of director of the Real Estate Bank of Arkansas, which is the State Bank of Ar-

¹ Ibid. 131, 132.

² 3 Ibid. 20.

³ 5 Ibid. 510.

⁴ 11 Ibid. 74.

⁵ 5 Mass. R. 231, 232; and see *People v. Tibbets*, 4 Cow. (N. Y.) R. 358

⁶ *State v. Buchanan, Wright*, (Ohio) R. 233.

kanas.¹ The mere private officers, or servants of a corporation, as the managers of a lottery granted to it, removable by it at pleasure, or for good cause, it is held, are not liable to this process; for the only effect of a judgment against them would be a removal from office, and the corporation might immediately reinstate them.²

The information is said to be grantable, only where the ancient writ of *quo warranto* would lie;³ and this, as we have seen, issued against those who exercised franchises in derogation of the rights of the crown. "Franchise," is a word of extensive signification; and is defined by Finch, to be "a royal privilege in the hands of a subject."⁴ If, in England, a privilege in the hands of a subject, which the king alone can grant, would be a franchise, with us a privilege, or immunity of a public nature, which cannot legally be exercised without legislative grant, would be a franchise.⁵ The State, or Commonwealth, stands in the place of the king, and has succeeded to all the prerogatives and franchises proper to a republican government. With us, therefore, to assume a power which cannot be exercised, without a grant from the sovereign authority, or to intrude into the office of a private corporation, contrary to the provisions of the statute which creates it, is, in a large sense, to invade the sovereign prerogative, to assume or violate a sovereign franchise.⁶

In New York, it has been decided, that where a person is in office by color of right, the remedy is not by mandamus to admit another having lawful claim; but by information in the nature of a *quo warranto*.⁷

¹ *State v. Ashley*, 1 Pike, (Arkan.) R. 514.

² *Commonwealth v. Dearborn et al.* 15 Mass. R. 125, 127; and see *Rex v. Corporation of Bedford Level*, 6 East, 359, per Lawrence, J.

³ *Rex v. Dawbeny*, Stra. 1196; *Rex v. Shepherd*, 4 T. R. 381; *The Commonwealth v. Murray*, 11 Serg. & Rawle, (Penn.) R. 74, per Tilghman, C. J.

⁴ Finch, 164.

⁵ *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 387, per Spencer, J.

⁶ *Ibid*; *The Commonwealth v. Arrison and others*, 15 Serg. & Rawle, (Penn.) R. 130, 131, per Tilghman, C. J.

⁷ *The People v. The Corporation of New York*, 3 Johns. (N. Y.) Cas. R.

§ 4. 1. Where the attorney general files an information *ex officio*, we have seen that it is not necessary for him to obtain the leave of the court.¹ But informations at the suit of private persons, whether under the statute of Anne,² or the statute of New York,³ or exhibited as at the common law, can be filed only by leave of court. The information is not granted of course, but depends upon the sound discretion of the court, upon the circumstances of the case,⁴ and will not be granted, where, as in case of a turnpike company opening a road through the land of a person without making him a compensation pursuant to the direction of the act, there is an adequate remedy by action.⁵ It would seem, that previous to the 4 and 5 William and Mary, c. 18., all the king's subjects might make use of the name of the clerk or master of the crown office, in filing informations as at common law, without the leave of the court;⁶ but that statute restrains the clerk of the crown office from exhibiting or filing informations, without the express order of the court.⁷ In analogy to this statute, and the statute of Anne, even in those States of our own country, where these or similar acts are not in force, it is assumed in all the cases, that an information in the nature of a *quo warranto*, to try the right to an office, &c. at the prose-

79; *The People v. Hillsdale and Chatham Turnp. Co.* 2 Johns. (N. Y.) R. 190. For cases in which the information will lie, see 4 Cow. (N. Y.) R. 101, n. a.

¹ Ante, § 2.

² Ante, § 3, n. 1.

³ 1 R. L. (N. Y.) 108, § 4.

⁴ Bac. Abr. Informations, D.; *The King v. Trevenen*, 2 B. & A. 339; *The People v. Sweeting*, 2 Johns. (N. Y.) R. 184.

⁵ *The People v. Hillsdale and Chatham Turnpike Co.* 2 Johns. (N. Y.) R. 190.

Rex v. Sir Wm. Trelawney, 3 Burr. 1616, per Wilmut, J.; see, however, *Willcock on Corp.* 465.

⁷ *Ibid.*; Bul. N. P. 210; Sel. N. P. (Wheat's ed.) 873, where see stat. For forms of informations to try the title to offices, &c. see 6 Wentw. Plead. 28 to 234; 2 Kyd on Corp. 403; *Commonwealth v. Fowler*, 10 Mass. R. 291; *The State v. Tudor*, 5 Day's (Conn.) Cas. in Error, 329; 4 Cow. (N. Y.) R. 106, &c.

cution of one of the parties interested, is grantable only at discretion.

2. Courts will, however, usually grant this information, where the right, or the fact on which the right depends, is disputed and doubtful ;¹ where the right turns upon a point of new or doubtful law,² or where there is no other remedy.³ It has been held, that an information may be granted to impeach the title to an office, though the objection to the title arises from a defect in the title of the officer's electors,⁴ provided the application be made within a proper time.⁵ This is done, it is said, by introducing on the record an issue respecting the title of the electors, so that their right is tried, as incidental to the principal question, though they have not been ousted on an information filed against them.⁶ The usual and most proper mode is, however, to attack by information the title of the electors first ; though there may be cases, where the title of the electors cannot be impeached at all, unless in a proceeding against the person whom they have elected.⁷ And in the case of *The King v. Hughes*,⁸ it was laid down by Bailey, J. as settled law, since the case of *Symmers v. Regem*,⁹ that where the electors are members of a corporation, whose titles might be impeached by *quo warranto* informations, those titles could not be investigated collaterally in order to affect the title of the elected. And where judgment of ouster has been given against electors, through whom an office is claimed, this may be a reason for granting an information to impeach the title to the

¹ *Rex v. Latham*, 3 Burr. 1485 ; *S. C. Rex v. Lathrop et al.* 1 Bl. R. 468.

² *Rex v. Carter*, Cowp. 58 ; *Rex v. Goodwin*, Doug. 397 ; *Rex v. Scott*, 1 Barnard, 24.

³ *Cas. K. B.* 225 ; *Bul. N. P.* 212.

⁴ *The King v. the Corporation of Penryn*. 8 Mod. 216.

⁵ *Symmers v. Regem*. Cowp. 507 ; *Rex v. Mein*, 3 T. R. 598, per Kenyon, C. J.

⁶ *Rex v. Hebden*, 2 Stra. 1109 ; *S. C. Andr.* 388 ; *Symmers v. Regem*, Cowp. 500, *arguendo*.

⁷ *Symmers v. Regem*, Cowp. 500, *arguendo* ; *Rex v. Mein*, 3 T. R. 598, per Kenyon, C. J.

⁸ 4 B. & C. 368, 377, 378.

⁹ *Supra*.

office ; and the judgment of ouster against his electors will be admissible evidence against the officer ; though not conclusive, since it might have been obtained by collusion.¹ It was no objection to granting the writ at the instance of a private relator, that the objection by him made lies against every member of the corporation, and tends to dissolve it altogether.²

If a *prima facie* case of usurpation is made out, and there appears a fair doubt on the title of the defendant, the court will not discuss the question in the summary way of motion, but send the facts to a jury.³ In the following cases the court has thought proper to send the question to a jury, or leave the parties to bring it more solemnly before them, on demurrer ; and therefore allowed the information. Where the eligibility of the defendant to the office of burgess was doubtful, on account of his nonage ;⁴ or his eligibility to the office of capital burgess was doubtful, on account of his non-residence ;⁵ or residence being a qualification, where the question, upon the facts, was, whether he was a resident.⁶ Where the questions were, whether being a capital burgess was required by the charter as a previous qualification for being elected mayor ; and whether the defendant had been duly elected into the office of capital burgess, it being admitted he was a burgess, which he contended to be the only qualification required by the charter.⁷ Where A. being one of two nominees, notice had been given that he was ineligible, and a majority voted for A., but B. the defendant was admitted ; the question was upon the ineligibility of A. under the statute of Anne ; for if it was

¹ *Rex v. Hebden*, 2 Stra. 1109 ; S. C. Andr. 388 ; *Symmers v. Regem*, Cowp. 500, *arguendo* ; *Rex v. Grimes*, 5 Burr. 2601.

² *Rex v. White*, 1 Nev. & P. (K. B.) 84 ; *Rex v. Parry*, 6 Adolph. & Ellis, (K. B.) 810 ; *Reg. v. Parry*, 2 Nev. & P. (Q. B.) 414.

³ Willcock on Mun. Corp. 469.

⁴ *Rex v. White*, C. T. H. 8 ; *Rex v. Carter*, Cowp. 59, 226 ; *Rex v. Courtenay*, 9 East. 261 ; *Claridge v. Evelyn*, 5 B. & A. 86.

⁵ *Rex v. Pool*, 2 Barnard, 93.

⁶ *Rex v. Lathrop*, 1 W. B. 471 ; S. C. *Rex v. Latham*, 3 Burr. 1487 ; *Rex v. Richmond*, 6 T. R.-561.

⁷ *Rex v. Tucker*, 1 Barnard, 27.

found that he was qualified, B. must be ousted, and A. admitted.¹ Where the direction was doubtful, the question being upon the qualification of the electors,² or upon an omission, in the notice, of the purpose of the corporate meeting,³ or where the doubt upon the affidavits was, whether the bailiff was an integral part of the corporate assembly, he not having been present at the election.⁴ Where the question was, whether the officer, who had a right by custom to hold over, could be put out by a new appointment, after a defective appointment made at the proper time.⁵ Where there was a doubt on the words of the charter, who were the persons who ought to admit, and of course, whether the defendant was legally admitted.⁶ Where the doubt was, whether the office, to oust the defendant from which the information was prayed, was compatible with another which he had subsequently accepted.⁷

3. Although it is evident that the defendant has no right, yet if the public has sustained no injury, the court will exercise a discretion as to granting the information on the relation of the particular applicant. It has been granted, however, to one having no interest in the affairs of the corporation, where there was a strong case against the defendant ;⁸ to the inhabitant of a borough, though not a freeman, the municipal government being vested in the corporation ;⁹ to one who was elected into the corporation previous to, but admitted during the mayoralty of the defendant, to oust whom the information was sought ;¹⁰ to a corporator so poor

¹ Anne, c. 20, § 8 ; *Rex v. Goodwin*, Doug. 385.

² *Rex v. Whitchurch*, 8 Mod. 210.

³ *Rex v. Tucker*, 1 Barnard, 27 ; *Rex v. Sandys*, 2 Barnard, 301, 302.

⁴ *Rex v. Lathrop*, 1 W. B. 470 ; *S. C. Rex v. Latham*, 3 Burr. 1485.

⁵ *Rex v. Butler*, 8 Mod. 350.

⁶ *Rex v. Trew* 2 Barnard, 371.

⁷ *Rex v. Pateman*, 2 T. R. 779 ; and see *Rex v. Thomas Bond*, 6 D. & R. 333.

⁸ *Rex v. Brown*, 3 T. R. 574, n. The application was made, however, in this case for the purpose of enforcing a general act of parliament, which interested all the corporations in the kingdom.

⁹ *Rex v. Hodge*, 2 B. & A. 344, n.

¹⁰ *Rex v. Trevenen*, 2 B. & A. 342.

as not to be responsible for costs ;¹ to a corporator who voted for the defendant at his election to the office, from which he seeks to oust him, he being ignorant, at the time of his election, of his disqualification ;² to a corporator who was present and voted at the defendant's election (against him), and who has since attended corporate meetings, at which the defendant presided, even though a judgment against the defendant would suspend the corporation ;³ to a corporator who applied to oust the defendant from the office of alderman, having objected to his qualification at the time of his election, though he afterwards made no objection to his election to the principal office of magistracy, which required the defendant to be an alderman as a qualification ; and who attended at, and concurred in corporate meetings, where the defendant presided or attended in his official capacity ;⁴ to a town clerk who had been long acquainted with a defect in the defendant's title, it not appearing that he had lain by intentionally, or been guilty of any improper conduct in the affair ;⁵ to an applicant friendly to the defendant, who instituted the proceeding for the purpose of enabling the latter to enter a disclaimer, where it was doubtful whether he held incompatible offices, and there was no way of resigning one of them. In such case, however, the court will impose any restrictions on the parties, which the interests of third persons may require.⁶ And where the application is made on the affidavit of several persons, all of whom, but one, concurred in the election of the defendant, if that one will avow himself the relator, and render himself responsible for costs, his being joined with others, who concurred in the election, will be no reason for refusing the information to the unexceptionable applicant, provided it does not appear that he is the tool of the others.⁷ The abandonment of a former information for

¹ Ibid.

² *Rex v. Smith*, 3 T. R. 574.

³ *Rex v. Morris, & Rex v. Stewart*, 3 East, 216.

⁴ *Rex v. Clarke*, 1 East, 46.

⁵ *Rex v. Binsted*, Cowp. 77.

⁶ *Rex v. Marshall*, 2 Chit. R. 370.

⁷ *Rex v. Simmons*, 4 T. R. 223 ; *Rex v. Cudlipp*, 6 T. R. 509.

the same cause is, of itself, no reason for refusing an information ; as that may have been by collusion.¹

§ 5. 1. The court will refuse an information in the nature of a *quo warranto*, if the defendant can show that his right has already been determined on a writ of mandamus ;² or been acquiesced in for a length of time.³ The time, within which the title to a corporate office might be impeached at the common law, was indefinite, varying with the circumstances of each particular case ;⁴ and it was at one time thought better by Lord Mansfield, that there should be no fixed rule on the subject, but that the period of limitation should in each case be left to the discretion of the Court.⁵ The Court of King's Bench at length, however, set a limit to their discretion, and in the famous *Winchelsea* causes, after taking due time to consider, publicly declared their resolution to be, that after twenty years' unimpeached possession of a corporate franchise, no rule should be granted against the person in possession, to show by what right he holds it, in analogy to other cases of limitation.⁶ Lord Mansfield said, in the name of the court, " that twenty years was the *ne plus ultra*, beyond which the court would not disturb a peaceable possession of a franchise ; but that in every case *within* twenty years, their granting the rule, or refusing to grant it, would depend upon the particular circumstances of the case that should be in question before them."⁷ In Easter Term 1791, the court, finding twenty years much too long a period of limitation, and Buller, Justice, observing, that previous

¹ *Rex v. Bond*, 2 T. R. 771.

² 2 Hawk. P. C. ch. 26, § 9.

³ *Bac. Abr. Informations. D.*

⁴ *Rex v. Powell*, 8 Mod. 165 ; *Rex v. Pike*, 8 Mod. 286, cited 1 T. R. 4, n. and 3 T. R. 311 ; *Rex v. Williams*, 1 Str. 677 ; *Rex v. Latham*, 3 Burr. 1486, per Lord Mansfield ; and see *Rex v. Stacey*, 1 T. R. 1, 3, n. ; *Rex v. Newling*, 3 T. R. 210, 211 ; *Rex v. Bond*, 2 T. R. 767.

⁵ *Rex v. Latham*, 3 Burr. 1486.

⁶ *Winchelsea Causes*, 4 Burr. 1962, 2022, 2121 ; *Rex v. Rogers*, 4 Burr. 2523 ; and see *Rex v. Stephens*, 1 Burr. 433 ; *Rex v. Bond*, 2 T. R. 767 ; *Rex v. Carter*, Cowp. 58 ; *Rex v. Binsted*, Cowp. 75.

⁷ *Winchelsea Causes*, 4 Burr. 1963.

to the Winchelsea causes several cases had been decided wholly on the ground of length of time, though considerably within twenty years, of which the court were entirely unapprised at the time those causes were decided, limited their discretion, in granting applications of this nature to six years, beyond which time they would not under any circumstances suffer a party who had been so long in possession of his franchise, to be disturbed.¹ This last period of limitation was shortly afterwards confirmed by act of parliament.² The meaning of the above rule, as subsequently explained by the court, is, that after a quiet possession of his office for six years, the officer shall be taken to be a good one to all intents and purposes.³ Hence, the court will not grant an information to impeach a derivative title, if the person claiming the original title has been in undisturbed possession of his office for six years; for the period of limitation would be no protection to an officer, if all his acts done previous to the expiration of that period, were after it to be treated as null.⁴ This limitation does not, however, apply to a case of continuing incompatibility of offices; as where a party held the offices of capital burgess and town clerk for more than six years.⁵

2. The court will not grant an information against one who has merely claimed to be admitted to an office or franchise, though his claim is founded upon an election which is not *prima facie* void, nor against those who merely claim to be a corporation; but there must be an user and possession.⁶ But an actual swearing in has been adjudged a sufficient user, though it be defective

¹ *Rex v. Dicken*, 4 T. R. 282, 284; *Rex v. Peacock*, 4 T. R. 684.

² Stat. 32, Geo. 3, 58; and see *Rex v. Autridge*, 8 T. R. 467; *Rex v. Trevenen*, 2 B. & A. 482; *Rex v. Robert Brooks*, 8 B. & C. 321; 2 M. & R. 389.

³ *Rex v. Peacock*, 4 T. R. 686, per Ashurst, J.

⁴ *Rex v. Peacock*, 4 T. R. 686, per Ashurst, J.

⁵ *Rex v. Lawrence*, 2 Chit. R. 371.

⁶ *Rex v. Ponsonby, Sayer*, 247; S. C. 1 Keny. Cas. 26; *Rex v. Whitwell*, 5 T. R. 86; *People v. Thompson*, 16 Wend. (N. Y.) R. 655. The first words of the statute of Anne are, as we have seen, "If any person or persons shall usurp, or intrude into, or unlawfully hold and execute," &c. Ante, § 3.

because made before an improper person, or before the corporate assembly after the president, an integral part of it, had left.¹ If a person has been recently elected into office by persons having no color of authority to elect, it is said to be unnecessary to oust him in *quo warranto*, though he has entered upon his office; for the election is a nullity, and the proper electors may choose an officer into the place as vacant. But if he has held undisturbed possession of the office, and exercised it for some time, he is to be regarded as an officer *de facto*, and an information may be granted.² And in New York, it has been decided, that where a person is in office by color of right, the remedy is not by mandamus to admit another having lawful claim, but by information in the nature of a *quo warranto*.³ In *Rex v. Scott*,⁴ an information was, after some hesitation, granted against a mayor for holding over his year, and preventing the election of a successor, because it was said there was no other remedy. Mr. Willcock thinks, that in such case, a mandamus would now be granted to proceed to a new election, notwithstanding the right to hold over, and without a previous ouster.⁵ In the *People v. Sweeting*,⁶ the Supreme Court of New York, and in the *Commonwealth v. Athearn*,⁷ the Supreme Court of Massachusetts refused information against officers, whose time it appeared would expire before the inquiry could have any effect, leaving the parties to their common remedies. In Ohio, the writ of *quo warranto* will be made returnable forthwith, or at a short day, in such cases, in order that a trial may be had before the term of office expires.⁸ In England, however, it is not con-

¹ *Rex v. Pursehouse*, 2 Barnard, 264; *Rex v. Harwood*, 2 East, 180; *Rex v. Tate*, 4 East. 340; *Rex v. Buller*, 8 East. 392; see also, *Rex v. Williams*, 1 Burr. 407; S. C. 1 W. B. 95; S. C. 2 Keny. Cas. 75.

² *Anon.* 1 Barnard. 345.

³ *The People v. The Hillsdale & Chatham Turn. Comp.* 2 Johns. (N. Y.) R. 190.

⁴ 1 Barnard, 24.

⁵ Willcock on Mun. Corp. 462, 463.

⁶ 2 Johns. (N. Y.) R. 184.

⁷ 3 Mass. R. 285; and see *Commonwealth v. Sparks*, 6 Whart. (Penn.) R. 416.

⁸ *State v. Buchanan*, Wright, (Ohio) R. 233; but see *Commonwealth v. Sparks*, 6 Whart. (Penn.) R. 416.

sidered necessary, that the person should continue to hold the office at the time of applying for the information against him ; but it has been granted in case of an annual office, where the year had expired, and four years elapsed since, during which others had been successively elected ; also where the office was permanent, but the usurpation had ceased by the resignation of the intruder before the application, particularly as there was a doubt of the sufficiency of the resignation ; and also where one legally in office had resigned it, though without deed, and afterwards usurped it, and acted again.¹ And if the office has determined, though there can be no ouster, there may be judgment for the fine.² When the original title of an officer is sufficient, though good cause of amotion be shown, the information will not be granted until an actual amotion has been made, even in a case where the charter declares that for such cause of amotion the officer shall vacate his office ; for the office is not determined until the amotion.³

§ 3. In England, where the franchise no ways concerns the public, as all those franchises which relate to the government of a corporation, or the election of members of parliament,⁴ to fairs and markets,⁵ are said to do, but is wholly of a private nature, as a coney warren,⁶ or the office of a church-warden,⁷ the informa-

¹ *Rex v. Powell*, Sayer, 239 ; *Rex v. Williams*, 1 W. B. 95 ; *Rex v. New Radnor*, 2 Keny. Cas. 498 ; *Rex v. Warlow*, 2 M. & S. 76 ; *Rex v. Payne*, 2 Chit. R. 367.

² *Ibid.*

³ *Lord Bruce's Case*, 2 Stra. 819 ; *Rex v. Ponsonby*, Sayer, 248 ; S. C. 1 Keny. Cas. 26 ; S. C. 5 Bro. P. C. 299 ; *Rex v. Heaven*, 2 T. R. 776.

⁴ *Case of Borough of Horsham*, 3 T. R. 599, n. a ; *Rex v. Mein*, 3 T. R. 598, 599 ; *Rex v. Bingham*, 2 East, 308. For "an office of great trust and preëminence within the borough, touching the election and return of burgesses to serve in parliament," quo warranto will not lie. *Rex v. McKay*, 4 B. & C. 351 ; 6 D. & R. 432.

⁵ 2 Hawk. P. C. 26, § 9. Qu. as to fairs and markets. *Rex v. Marsden*, 3 Burr. 1812 ; S. C. 1 W. B. 579 ; *Ibbotson's Case*, C. T. H. 248 ; *Hardres*, 162, arguendo.

⁶ *Rex v. Sir Wm. Lowther*, 2 Ld. Ray. 1409 ; S. C. 1 Stra. 637 ; *Ibbotson's Case*, C. T. H. 248 ; *Rex v. Caan*, Andr. 15 ; *Rex v. Shepherd*, 4 T. R. 381.

⁷ *Rex v. Dawbeny*, 2 Stra. 1196 ; *Rex v. Shepherd*, 4 T. R. 381.

tion will be refused. We have before seen, however, that in this country, at least, informations are granted in case of the usurpation of the offices or franchises of private corporations.¹

4. On the ground of personal objection to the applicant, the court has refused the information to the legal adviser of the defendant, who had counselled him during the exercise of his office that his election was good ;² to a stranger who had no interest in the affairs of the corporation, where public expediency did not require the application ;³ to a corporator, who appeared to be the mere tool of some other person, on whose application the court would have refused it,⁴ whose own title is subject to the same defect as that which he seeks to impeach,⁵ who was elected under a president whose title is subject to the same defect as the defendant's,⁶ or who voted at the election sought to be impeached on the ground of an objection to the presiding officer, unless he shows, that he was ignorant of the objection at the time of voting,⁷ who has concurred in the act, or acquiesced in the title of the defendant, which he seeks to impeach,⁸ or in the election of another officer of the same kind in the corporation, who was liable to the same objection,⁹ provided the irregularity complained of was at the time a subject of notice, who has concurred in an agreement not to enforce a by-law, upon which he grounds

¹ Ante, § 3.

² *Rex v. Paine*, 2 Chit. R. 369.

³ *Rex v. Grant*, 11 Mod. 299 ; *Rex v. Stacey*, 1 T. R. 3.

⁴ *Rex v. Stacey*, 1 T. R. 4 ; *Rex v. Cudlipp*, 6 T. R. 503 ; *Rex v. Trevenen*, 2 B. & A. 344, 482. When the Court suspects collusion from the affidavits, it will require explanatory affidavits. Ibid.

⁵ *Rex v. Bond*, 2 T. R. 771 ; *Rex v. Peacock*, 4 T. R. 687 ; *Rex v. Cudlipp*, 6 T. R. 503 ; *Rex v. Cowell*, 6 D. & R. 336 ; *Rex v. Bracken*, 1 Alcock & Napier, (Irish) R. 113. As to defendant's affidavits in such case, see *Rex v. Bond*, 2 T. R. 771.

⁶ *Rex v. Cudlipp*, 6 T. R. 503.

⁷ *Rex v. Slythe*, 6 B. & C. 240 ; 9 D. & R. 190 ; *Reg. v. Parry*, 2 Nev. & P. (Q. B.) 414.

⁸ *Rex v. Stacey*, 1 T. R. 2 ; *Rex v. Clarke*, 1 East. 46 ; *Rex v. Trevenen*, 2 B. & A. 343, 482.

⁹ *Rex v. Parkyn*, 1 B. & Adolph. 690 ; *Rex v. Benney*, Ibid. 684.

his attempts to impugn the defendant's title,¹ or who has long known the defect, and lain by intentionally until judgment against the defendant would have the effect to dissolve the corporation.² It has been refused to persons who have lain by without prosecuting within a reasonable time, though with a full knowledge of the facts ;³ to a town-clerk who seeks to impugn the defendant's title on the ground, that the defendant has not taken the oaths to government, which the town-clerk, being the proper officer to administer, did not tender, and which the defendant made affidavit he would have taken, had he known them to be necessary,⁴ to a town-clerk, who, after a long acquiescence, made affidavit that he did not administer the oath of allegiance to a corporator, though he made the entry on the corporation books that he did so ;⁵ and it has been refused to one who founds his application upon a confession of a defect of title, which he had artfully obtained from the defendant.⁶ It is no objection, however, that the relator and other persons with whom he acted were influenced by strong party spirit, and had, during two or three years, withdrawn themselves from corporation business, to the inconvenience of the borough ;⁷ or that the person applying is in low and indigent circumstances, and that there is strong reason to suspect that he is applying not on his own account, but at the expense, and in collusion with a stranger ; though in this last case the court required security for costs.⁸

5. If the application is manifestly frivolous and vexatious, the court will discharge the rule with costs.⁹ If the person, from

¹ *Rex v. Mortlock*, 3 T. R. 301.

² *Rex v. Bond*, 2 T. R. 771 ; *Rex v. Trevenen*, 2 B. & A. 482.

³ *Rex v. Wardroper*, 4 Burr. 2024, per Aston, J.

⁴ *Rex v. Hart*, 8 Mod. 56. In this case the town-clerk had long lain by, and came forward at the instigation of a stranger to increase the latter's interest in an election.

⁵ *Rex v. Williams*, 1 Stra. 677.

⁶ *Rex v. Dicken*, 4 T. R. 283.

⁷ *Rex v. Benney*, 1 B. & Adolph. 684.

⁸ *Rex v. Wakelin*, Ibid. 50 ; and see *Rex v. Parry*, 6 Adolph. & Ellis, (K. B.) 810.

⁹ *Rex v. Carpenter*, 2 Stra. 1039 ; *Rex v. Lewis*, 2 Burr. 780 ; *Rex v. Mortlock*, 3 T. R. 301.

whom the title was derived, has been some time dead,¹ or the parties have acquiesced in the title,² it seems that an information will not be granted to impeach it. Neither will it be granted after a long acquiescence, where the objection, if it prevailed, might go to dissolve the corporation.³ And the court will, in their discretion, disregard a secondary and incidental ground for an information, (though it might have been sufficient if brought before them in the first instance,) where it is resorted to by way of forlorn hope, after the original and main ground has failed.⁴ And where the relator has twice obtained rules *nisi* for informations in the nature of a *quo warranto*, calling upon the party to show why he exercised the office of mayor of a borough, which rules have been discharged on cause shown; the court will not allow the same relator, on an application against the succeeding mayor, to raise the same questions as to the title of the former mayor to exercise the office.⁵ The information has been refused to enforce a claim against a turnpike company, for damages done to the relator's property in laying out a road, though the act required the company to pay the damages;⁶ and, in Pennsylvania, it was refused to impugn the title of the minister of a religious society, on the ground, that the party moving for the information, and the defendant, did not claim under the same charter of incorporation.⁷

§ 6. The motion for leave to file an information must be founded upon affidavits, stating all the grounds upon which the defendant's title is impeached. These ought not to be entitled in any cause.⁸ The affidavits must state facts and not legal deduc-

¹ *Rex v. Spearing*, 4 T. R. 4, n. a.

² *Rex v. Stacey*, 1 T. R. 4.

³ *Rex v. Carter*, Cowp. 59, per Ld. Mansfield.

⁴ *Rex v. Osbourne*, 4 East, 327, 336.

⁵ *Rex v. Langhorne*, 2 Nev. & M. 618.

⁶ *The People v. The Hillsdale and Chatham Turnp. Comp.* 2 Johns. (N. Y.) R. 190.

⁷ *The Commonwealth v. Murray*, 11 Serg. & Rawle, (Penn.) R. 73.

⁸ *Rex v. Pierson*, et al. Andr. 313; *Rex v. Cole*, 6 T. R. 642; *Haight v. Turner*, 2 Johns. (N. Y.) R. 371, 372.

tions, as, not the mere acceptance of an office, but the facts which constitute the acceptance, and that too with so much certainty and form, that an indictment for perjury may be sustained upon them, if they are wilfully false.¹ The affidavit of a relator, "that he has been informed and believes," that the defendant exercises the office which he is charged with usurping, is, however, sufficient.² If affidavits are made on a motion for an information against A., they cannot be read in a similar motion against B., because, it is said, that in such case an indictment for perjury will not lie upon them if false.³ It seems, that the prosecutor may use the affidavits of a person, whom the court would not allow to be the relator.⁴ When the affidavits set forth a charter, they must state either its acceptance, or that an usage has prevailed in conformity to it, from which its acceptance may be inferred; and where the affidavits were ill for omitting this, the court refused leave to amend them, but put the party to a new application.⁵ Affidavits in support of a *quo warranto* should also state any usage which there may be differing from what might be held to be the construction of the charter,⁶ and a rule for a *quo warranto* was dismissed with costs, where the affidavits in support had suppressed several material facts.⁷ If the affidavits in support of the rule omit a material fact, which is stated in an affidavit filed on the other side, the latter may be read by the prosecutor in support of his rule.⁸ On a motion for an information against a corporator, on the ground of his acceptance of an incompatible office, the relator must show a legal appointment to the second

¹ *Rex v. Sargeant*, 5 T. R. 469; *Rex v. Scolden*, 2 Barnard, 439; *Rex v. Harwood*, 2 East, 180; *Rex v. Newling*, 3 T. R. 310; *Rex v. Lane*, 5 B. & A. 488; *Reg. v. Hatter*, 3 Perr. & Dev. 263. For form of affidavits, see *The Commonwealth v. Douglass*, 1 Binn. (Penn.) R. 77.

² *Rex v. Slythe*, 6 B. & C. 240; 9 D. & R. 226.

³ *Rex v. Thetford*, 11 Mod. 141; *Tidd's Prac.* 498, &c.

⁴ *Rex v. Binstead*, Cowp. 77; *Rex v. Symmons*, 4 T. R. 224; *Rex v. Brame*, 1 Nev. & P. (K. B.) 773; *Reg. v. Parry*, 2 Nev. & P. (Q. B.) 414.

⁵ *Rex v. Bazey et al.*, 4 M. & S. 253.

⁶ *Rex v. Headley*, 7 B. & C. 496; 1 M. & R. 345.

⁷ *Rex v. Hughes*, 7 B. & C. 719; 1 M. & R. 625.

⁸ *Rex v. Mein*, 3 T. R. 597.

office.¹ He is bound, on a rule *nisi*, by the day on which, in his affidavit, though founded on information and belief, the election is alleged to have taken place ; and if that day is mistaken, the defendant is not bound to show a regular election on another day.²

If the applicant makes out a *prima facie* case, the usual course is for the court to grant a rule *nisi* upon the defendant, to enable him to prove the evasiveness or insufficiency of the charge against him, or any legal reason why the information should not be granted.³ The court have, however, a discretion, whether they will go through the formality of a rule to show cause ; and where the whole case had been disclosed by the defendant's answers in chancery and the answers of others, touching the subject of the application, the court looked into the answers, and granted a rule for an information in the first instance.⁴ Whether facts are asserted or denied by the defendant, he should always be prepared with affidavits of others, as well as with his own ; for his alone will not be much respected where the facts are of such a character, that they would be known to others as well as to himself.⁵ These may be entitled,⁶ or not,⁷ at the defendant's choice. If the affidavits for the defendant so positively deny the facts asserted on the other side, as to sustain an indictment for perjury, the information will, it seems, be refused, until an indictment has been prosecuted, and the persons perjured, convicted.⁸ If these affidavits, and the cause shown, do not place the matter beyond dispute, the rule will be made absolute ;⁹ but the Court of King's Bench, in conformity to the rule concerning criminal informations,

¹ *Rex v. Day*, 9 B. & C. 702 ; 4 M. & R. 541.

² *Rex v. Rolfe*, 1 Nev. & M. 773.

³ *Bul. N. P.* 210.

⁴ *The People ex rel. Barker v. Kip et al.*, 1 U. S. Law Journal, 286, cited 4 Cow. R., 106, n.

⁵ *Rex v. Trew*, 2 Barnard, 371 ; *Respublica v. Prior*, 1 Yeates, (Penn.) 206, that the evidence must be by affidavit.

⁶ *Rex v. Pierson et al.*, Andr. 313 ; *Rex v. Cole*, 6 T. R. 642.

⁷ *Rex v. Cole*, 6 T. R. 642, per Kenyon, C. J.

⁸ *Rex v. Woodman*, 1 Barnard, 101 ; *Rex v. Trew*, 2 Barnard, 371.

⁹ *Bul. N. P.* 210.

will not grant the rule for an information on the last day of the term.¹ By the English rules of practice, on applying for informations in the nature of a *quo warranto*, objections, intended to be made to the title of the defendant, must be specified in the rule to show cause; and no objection, not so specified, can be raised by the prosecutor in the pleadings, without the special leave of the court, or of some judge thereof.²

By the statutes of Anne,³ and of New York,⁴ one information may be exhibited to try the right of several persons. And after rules for several informations have been made absolute, where the situation of the defendants is precisely similar, the court will direct several informations to be consolidated.⁵ This, however, the court will not do, unless the offence is joint; for the consolidation would deprive the defendants of the opportunity of severally disclaiming or maintaining their offices.⁶ Sometimes, however, where there are several informations for the trial of titles precisely similar, one of them is tried, and the rest suspended upon an undertaking of the other parties to disclaim according to the event of the trial;⁷ but in *Rex v. Cozens*, the court refused to compel the relators and defendants in several informations to submit to be bound by the result of one, although the objections, in all, were the same.⁸

§ 7. An information cannot be quashed on motion, though both parties consent that it shall be done; but the court will, upon consent, direct the recognizances on both sides to be discharged.⁹ The appearance of the defendants to a rule to show

¹ *Rex v. Davies, Sayer*, 241.

² Reg. Gen. H. T. 7 and 8 Geo. 4; 9 D. & R. 247; and see *Rex v. Thomas*, 3 Nev. & P. (Q. B.) 288.

³ 9 Anne, ch. 20, § 4.

⁴ 1 R. L. (N. Y.) 108, § 4.

⁵ *Rex v. Foster*, 1 Burr. 573; *Symmers v. Regem*, Cowp. 500, 501.

⁶ *Rex v. Warlow*, 2 M. & S. 76.

⁷ *Ibid.* per Dampier, J.

⁸ 6 Dowl. (P. C.) 3; and 2 Nev. & P. (K. B.) 164.

⁹ *Rex v. Edgar*, and *Rex v. Brickell*, 4 Burr. 2297.

cause why an information should not be filed against them, does not constitute an appearance to the information; and therefore on filing the information, the relators are not entitled to a rule to plead. The rule to show cause is intended to obtain leave to institute the proceeding; but it is *commenced* by the information.¹

The next step is to compel the appearance of the defendant. On the ancient writ of *quo warranto*, the process to effect this was a summons; and if the party did not appear at a certain stage, the franchise or subject of the writ might be seized, on process to the sheriff, as a distress, and the defendant, was put to come in and replevy it, as he would any other distress. On an information in the nature of a *quo warranto*, the first process is a *venire facias* in the nature of a summons, and if there be no appearance upon it, then a *distringas*, between the teste and return of which, in England, there must be fifteen days, if the corporation be in a foreign county. But on information against a corporation, there can be no seizure of the franchise for a default, before a *distringas* has issued.² In Massachusetts, the first process against the defendant appears to be a summons;³ but in a case in Pennsylvania, it was a *venire facias*, returnable at the next term.⁴ If, where the proceeding is against a corporation, there be a default, there may be a judgment of seizure of the franchise usurped, into the king's hand, or in the king's right *quousque*, that is, *until the court shall further order*; and Chief Baron Eyre said, he conceived the effect of the judgment and seizure by the sheriff to be, that it laid the king's hands on the franchise of being a corporation, and upon other franchises mentioned as usurped in the information, so that the corporation could not use its liberties; the action of its vital powers was suspended;

¹ The Commonwealth v. Springer et al. 5 Binn. (Penn.) R. 353, 354.

² Rex v. Trinity House, 1 Siderf. 86; Brigg's Ca. 2 Roll. 46; Rex v. Wygorne, 2 Roll. 92; Rex v. Hertford, 1 Ld. Raymd. 426; S. C. 1 Salk. 374; S. C. Carth. 503; Rex v. Yarmouth, 3 Salk. 104.

³ Commonwealth v. Fowler, 10 Mass. R. 291; Commonwealth v. Dearborn et al. 15 Mass. R. 126.

⁴ Commonwealth v. Springer et al. 5 Binn. (Penn.) R. 353, 354.

and in this situation he had no doubt that a custos of the franchises might be appointed ; and that the corporation might be restored, on paying a fine to the king, or that the king might pardon the default by proclamation or charter.¹ Some of the old cases on the writ of *quo warranto* look as if, when the franchise was seized for a default, it was forfeited forever, unless replevied at a short day, in the same eyre or term. The practice on the information, in the time of Charles the Second, is said to have been similar ; and if the party did not appear, there was a judgment of seizure *quousque*, and if they did not replevy and appear in the next term, there was final judgment, unless they should plead within a certain time.² The law seems; however, to be, that if the defendant being summoned makes default, and makes another default at the return of the *venire facias*, judgment shall be, that the franchise be seized into the king's hands, and not that it shall be forfeited ; for it does not yet appear whether there be any cause of forfeiture, and no man shall finally lose his land or his franchise, on any default, if he has never appeared. The process must therefore be continued until the king may have final judgment.³ In *Rex v. The Mayor of Hedon*,⁴ Lord Chief Justice Lee said, " that there never was any process to outlawry on an *information* in the nature of a *quo warranto*, this not being like a *quo warranto* by original writ, which was in use before this manner of proceeding." Mr. Kyd seems, however, to think, that if there be any distinction between the writ and information in this particular, the process of outlawry lies in the latter, and does not lie in the former proceeding.⁵

If the defendant suffer the rule to show cause to be made absolute, or suffer judgment by default, others, whose derivative

¹ *Strata Marcella*, 9 Co. 29 ; 2 *Chester Cas.* 510, per Eyre, C. B. 567, 568 ; *The King v. Amery*, 4 T. R. 122 ; 2 Kyd on Corp. 496 to 511 ; Co. Ent. 539, b. ; Willcock on Mun. Corp. 483, 484.

² *Maidstone Cas.* Poph. 180 ; Judgment in *quo warranto*, Comb. 19 ; *Rex v. Chester*, 2 Show. 366 ; *Glos'ter stat.* 2 Inst. 282.

³ 3 *Jenkins. Cent. Ca.* 91 ; 2 Kyd on Corp. 502 ; *Strata Marcella*, 9 Co. 29 ; 2 *Chest. Ca.* 566 ; Willcock on Mun. Corp. 484.

⁴ 1 Wils. R. 245.

⁵ 2 Kyd on Corp. 438, 439.

titles may be affected by the judgment, may, it seems, open the rule again, and be permitted to show cause against the information, upon undertaking to indemnify the defendant against all expenses, costs, &c.¹

At common law, the court may either grant or deny a second imparlance, as they see cause.² By the statute of Anne,³ and also by the statute of New York,⁴ such convenient time may be allowed to the prosecutor, as well as to the defendant, to plead, reply, rejoin, or demur, as the court may think reasonable.

The defendant may disclaim the franchise mentioned in the information altogether, or he may disclaim it as to a part of the time during which he is alleged to have usurped it, and justify as to the other part.⁵ And under particular circumstances, as where the defendant was a very young man, and had never acted in the office, the court will, upon making the rule absolute, direct the defendant to enter a disclaimer without paying costs.⁶

§ 8. To a writ of *quo warranto*, or an information in the nature of one, the defendant must either disclaim or justify, and the State is bound to show nothing.⁷ He cannot plead *non usurpavit*; for the object of the proceeding is to ascertain, by enforcing the defendant to set forth, "by what warrant or authority" he exercises

¹ Bac. Abr. Informations, D.; *Rex v. Newling*, 3 T. R. 310, 311.

² For entry of an imparlance, see *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 363. As to second imparlance, *Herring v. Brown*, Comb. 11, 12.

³ 9 Stat. Anne, c. 20, § 6; 2 Lill. Prac. Reg. 510, B.; *Willcock on Mun. Corp.* 485. For rules to plead, reply, &c., in England, see *Rex v. Ginever*, 6 T. R. 695, and n.

⁴ 1 R. L. 109, § 6. In New York the rules to plead, reply, &c. are the same as in ordinary cases. See *The People v. Clark*, 4 Cowen, (N. Y.) R. 95; *Ibid.* 119, n. a.

⁵ Co. Ent. 527, b.; *Tidd's Prac.* 984; *Rex v. Biddle*, 2 Stra. 952. As to form of disclaimer, see Co. Ent. 527 to 529; 2 Kyd on Corp. 405; 4 Cowen, (N. Y.) R. 113, n., 114, n.

⁶ *Rex v. Holt*, 2 Chit. R. 366.

⁷ *State v. Ashley*, 1 Pike, (Arkan.) R. 553; *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 358.

the office, or holds the franchise.¹ For the same reason it is not sufficient to show a title in another; but any defect in the plea may be helped, by treating facts, stated in the information by way of inducement, as though they formed a part of the plea.² The plea in bar should set out the defendant's title at length, and conclude with a general traverse "without this, that he usurped, &c." or "by his authority, &c." The defendant may also plead in abatement; but he must, as in other cases of dilatory pleas verify the plea by affidavit;³ and if the affidavit be not entitled, the plea must be set aside.⁴ The general statutes of double pleas in England,⁵ and New York,⁷ do not extend to informations in the nature of a *quo warranto*; and there is no instance in which the court has given leave to plead two pleas.⁶ But in England, under the statute 32 Geo. 3, c. 58, the defendant may plead several pleas.⁹ This statute also gives the defendant leave to plead, that he has held the office for six years previous to the filing of the information, either

¹ Anon. 12 Mod. 225, per Holt, C. J.; *Rex v. Blagden*, 10 Mod. 299; *Rex v. Trinity House*, 1 Sid. 86; *Strata Marcella*, 9 Co. 28, a.; *Gloster* stat. 2 Inst. 281; *State v. Ashley*, 1 Pike, (Arkan.) R. 504; *People v. Bartlett et al.* 6 Wend. (N. Y.) R. 422.

² *Chest. Ca.* 548; 2 *Leon. Ca.* 31; *Partridge's Ca. Cro. E.* 125; *Musgrave v. Nevinson*, 1 *Stra.* 585; *Rex v. Leigh*, 4 *Burr.* 2145; *Rex v. Hebden*, *Andr.* 392.

³ *Rex v. Blagden*, *Gilb. R.* 145; *Strata Marcella*, 9 Co. 27, a. For forms of pleas, see *Co. Ent. Quo Warranto*; 2 *Kyd on Corp.* 406; 6 *Went. Plead.* 28 to 242; *State v. Foster*, 2 *Halst. (N. J.) R.* 101; *The State v. Tudor*, 5 *Day's (Conn.) Cas. in Err.* 330; *The People v. Utica Ins. Co.* 15 *Johns. (N. Y.) R.* 363 to 365; *The People v. Kip et al.* 1 *U. S. Law Journal*, 284; 4 *Cowen, (N. Y.) R.* 114 to 117.

⁴ 2 *Kyd on Corp.* 439; 1 *R. L. (N. Y.)* 519, § 19; *Rex v. Jones*, 2 *Stra.* 1161; *Rex v. Mayor of Hedon*, 1 *Wils.* 244; 6 *Went. Plead.* 51.

⁵ *Rex v. Jones*, 2 *Stra.* 1161.

⁶ 9 *Anne*, ch. 16, § 4.

⁷ 1 *R. L. (N. Y.)* 519, § 9.

⁸ *Rex v. Newland, Sayer*, 96; *Rex v. Leigh*, 4 *Burr.* 2146, *Sir Fletcher Norton and Lord Mansfield*; 4 *Cowen, (N. Y.) R.* 113, n.; *People v. Jones*, 18 *Wend. (N. Y.) R.* 601; *Rex v. Powell*, 8 *Mod.* 180.

⁹ 32 *Geo. 3, c. 58*, cited *Rex v. Autridge*, 8 *T. R.* 468; *Rex v. Stokes*, 2 *M. & S.* 71.

singly, or with other pleas.¹ To make out his title to an office, &c. the defendant, and indeed each party, must set forth in his pleadings so much of the charter or act of incorporation as he relies upon, without indeed it be set forth in the anterior pleadings,² or, as in case of some of our State banks, is of a public nature.³ It would seem that the pleas need not set forth that the charter had been accepted by the stockholders, since the information admits the existence of the corporation, or that it once had a legal existence.⁴

Where a company was incorporated on the condition, that it should, "within ten years from the passing of the act, furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in said city as shall agree to take it on the terms to be demanded by the company, in default whereof the corporation shall be dissolved," and an information in the nature of a *quo warranto* was filed against them, it was held, that the company being declared a body politic, and corporate *in presenti*, and having ten years to perform the acts required of them, the proviso was a defeasance, and not a condition precedent, and that therefore they were not bound in their plea to set forth the condition and allege performance, even for the purpose of showing a present right, although at the time of plea, the period limited by the proviso had long since expired; as in judgment of law, a corporation once shown to exist is presumed to continue, until the contrary be shown.⁵ In alleging a breach of this condition, the court held that the attorney general was bound to name such citizens as

¹ 32 Geo. 3, c. 58, § 1; *Rex v. Richardson*, 9 East, 470; *Rex v. Stokes*, 2 M. & S. 71; *Rex v. Lawrence*, 2 Chit. R. 371. But query, whether this statute enabling defendants in *quo warranto* to plead double, is confined to *corporate offices*. *Rex v. Highmore*, 5 B. & A. 771; 1 D. & R. 438.

² *Chest. Cas.* 549, 551; *Rex v. Smith*, 2 M. & S. 597.

³ *State v. Ashley*, 1 Pike, (Arkan.) R. 514.

⁴ *People v. Niagara Bank*, 6 Cow. (N. Y.) R. 196; *Bank of Auburn v. Aiken*, 18 Johns. (N. Y.) R. 137; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) R. 194; *Utica Ins. Co. v. Tillman*, 1 Wend. (N. Y.) R. 555; *People v. Saratoga and Rensselaer Rail Road Co.* 15 Wend. (N. Y.) R. 125; see *State v. Ashley*, 1 Pike, (Arkan.) R. 514.

⁵ *People v. Manhattan Company*, 9 Wend. (N. Y.) R. 351.

were willing to agree, &c., and that the naming of one individual would have been sufficient, and that he was also bound to aver a request on the part of those citizens who wished a supply of water, or an offer to pay for it, or that the defendants had notice of such willingness or desire.¹ A general allegation of the breach, "that the defendants have not furnished or continued a supply of water sufficient (or a supply or any other quantity of pure and wholesome water) for the use of such citizens dwelling in the city of New York, as were willing to agree for and take the same as aforesaid," was held not to be an allegation of a material fact on which issue could be taken, as it tended to an issue upon an emotion or affection of the mind, which is not traversable or susceptible of trial.²

If the right of election or admission is in a select body of the corporation, the defendant must show how they became possessed of that right, by setting forth specially in his plea the custom or clause in the charter conferring it upon them.³ He must with certainty set forth the custom or clause in the charter prescribing the mode of election;⁴ must show a vacancy of the office to which he was elected,⁵ and his own legal election and admission.⁶ If the defendant's plea admits his user of the office, and is insufficient, or if he demurs and fails on demurrer, judgment must pass against him, and a repleader will not be awarded, though the plea raised an immaterial issue.⁷ It is no answer to an allegation against a turnpike company, alleging as ground of forfeiture, that they have not kept their road in repair, that the individuals aggrieved have their remedy by private action; or that the gates of the turnpike

¹ Ibid.

² Ibid.

³ *Rex v. Lyme Regis*, Doug. 153.

⁴ *Rex v. Birch*, 4 T. R. 610; *Rex v. Haythorne*, 5 B. & C. 427; *Rex v. Hill*, 4 B. & C. 443; *Rex v. Rowland*, 3 B. & A. 134; *Rex v. Holland*, 2 East, 74.

⁵ *Rex v. Smith*, 2 M. & S. 597.

⁶ *Rex v. Holland*, 2 East, 74; *Rex v. Lisle*, Andr. 174; *Rex v. Smith*, 2 M. & S. 599, 600.

⁷ *Rex v. Phillips*, 1 Stra. 397; *Rex v. Boyles*, 2 Ld. Raymd. 1560; *Rex v. Patteson*, 4 B. & Adolph. 9; 1 Nev. & M. 612.

company may be thrown open by public officers, when the road is so much out of repair as to amount to a nuisance ; or that a penalty is imposed for a particular nonfeasance, unless the remedy by information is in such case taken away by express terms, or necessary implication.¹ Nor does a bond given by a grantee of the franchise of keeping a toll bridge, in pursuance of a statute requirement, that he would erect and complete the bridge, take away the proceeding by information, the bond being considered but a cumulative remedy.²

It seems that the prosecutor may demur to the whole plea, and reply to particular parts of it ;³ or he may reply specially, and put as many new matters in issue as he pleases, provided the new matter be consistent with that contained in the plea.⁴ If several things are necessary to constitute a complete title in the defendant, issue may be taken on each, and if any one of the issues, on a fact material to the title, be found against the defendant, there shall be judgment of ouster, and the defendant shall pay the costs on all the issues.⁵ The replication may impeach a necessary qualification of the defendant to an office, set forth in the plea as possessed by him ;⁶ or allege that the corporation was not "in due manner" assembled for the election of officers at the time of the defendant's election ; though the words "in due manner" are implied in the averment, that the corporation was not assembled for the purpose of electing.⁷ It may impeach the title of the presiding officer of the assembly at which the defendant was elected, thus showing the illegal nature of the assembly, and that too, it seems, even though the presiding officer be dead.⁸ It may

¹ *People v. Bristol & Rensselaerville Turnp. Road*, 23 Wend. (N. Y.) R. 222 ; *People v. Hillsdale and Chatham Turnp. Road*, Ibid. 254.

² *Thompson v. People ex rel. Taylor*, Ibid. 537.

³ *Rex v. Ginever*, 6 T. R. 733, n.

⁴ *Rex v. Latham*, 3 Burr. 1487 ; *S. C. Rex v. Lathrop*, 1 W. B. 471 ; *Rex v. Knight*, 4 T. R. 424.

⁵ *Bac. Abr. Informations, D.* ; *Rex v. Hearle*, 1 Stra. 627 ; 2 *Ld. Raym.* 1447 ; *Rex v. Downes*, 1 T. R. 453.

⁶ *Rex v. Brown*, 4 T. R. 277 ; *Piper v. Dennis*, 12 Mod. 253.

⁷ *Rex v. Hill*, 4 B. & C. 443.

⁸ *Rex v. Hebden*, 2 Stra. 1109 ; *S. C. And. 392* ; *Rex v. Spearing in Rex*

impeach the title of the defendant, by impeaching the legality of the titles of those who voted for him, at least, if their titles cannot be impeached by an information directly filed against them ; but, it seems, that where informations could have been obtained against the electors, as in all cases where they elect in right of a corporate franchise, it is sufficient for the defendant that they were *de facto* in the enjoyment of their franchise.¹ Where the plea is, that the election was according to the charter, the replication should be, not duly elected ; for this puts every thing in issue.² If the defendant and prosecutor in the pleadings both treat the former's admission as if it was an election, they cannot treat it otherwise on the trial, so as to affect the pleadings.³ The replication must not be argumentative ;⁴ and where it sets forth a condition on which a duty of the corporation arises, the facts which go to make up the condition, should be averred with all the exactness of pleading required in an action for a penalty.⁵

Where an information charges a corporation generally with usurpation, and the defendants set forth their charter and justify under it, it is no departure for the prosecutor to reply the causes of forfeiture.⁶ But if the defendant relies upon a charter qualifi-

v. Stacey, 1 T. R. 4, n. ; *Rex v. Smith*, 5 M. & S. 279. This right to impeach the title of the presiding officer is restricted in England by 32 Geo 3, c. 58, § 3.

¹ *Rex v. Penryn*, 8 Mod. 216 ; *Rex v. Pyke*, 8 Mod. 287 ; *Rex v. Hebden*, 2 Stra. 1109 ; S. C. Andr. 381 ; *Symmers v. Regem*, Cowp. 503 ; *Rex v. Grimes*, 5 Burr. 2601 ; *Rex v. Mein*, 3 T. R. 598 ; *Rex v. York*, 5 T. R. 72 ; *Rex v. Hughes*, 4 B. & C. 377, 378 ; 6 D. & R. 443 ; *Rex v. Smith*, 5 M. & S. 279.

² *Rex v. Hughes*, 4 B. & C. 376.

³ *Symmers v. Regem*, Cowp. 501.

⁴ *Rex v. Hughes*, 4 B. & C. 377.

⁵ *People v. Kingston and Middletown Turnp. Co.* 23 Wend. (N. Y.) R. 215, Cowen, J. ; *People v. Manhattan Co.* 9 Wend. (N. Y.) R. 373, 375, Sutherland, J.

⁶ *The People v. the Bank of Niagara*, 6 Cow. (N. Y.) R. 196 ; *Same v. Wash. & Warr. Bank*, Ibid. 211 ; *Same v. Bank of Hudson*, Ibid. 217 ; *Rex v. Amery*, 2 T. R. 515 ; *Case of City of London*, 3 Hargrave, St. Trials, 545 ; 1 Blk. Comm. 485 ; 2 Kyd on Corp. 486, 487.

cation in his plea, and sets out a by-law introducing a different qualification in his rejoinder, and relies on it, it is a departure.¹

The admission of a party to the proceedings may be read against him ; but an agreement of counsel for a rule to show cause is, like a demurrer, an admission only for the purpose for which it is made.² The person procuring the writ is, it seems, incompetent as a witness for the State, if he claims the office in question, and his competency can be restored only by his resignation of the office.³

§ 9. Where a fair trial cannot be had in the same county, on account of local prejudice, the court will, in its discretion, order a change of venue ;⁴ and in questions of great importance and difficulty, it will order a trial at bar.⁵ In Massachusetts, according to the well settled practice, though an information may be filed by the solicitor general in any county where the court may be sitting, yet the respondents can be holden to answer only in their own county.⁶

Though it was formerly doubted, whether a new trial could be

¹ *Rex v. Weymouth*, 7 Mod. 374 ; S. C. 4 Bro. P. C. 464 ; but see *Rex v. Hughes*, 4 B. & C. 368. For forms of pleas see 4 Cowen, (N. Y.) R. 113, 117, n. a. For forms of replications, see 6 Wentw. Plead. 28 to 242 ; *The State v. Foster*, 2 Halst. (N. J.) R. 101 ; 4 Cow. (N. Y.) R. 148, n. a. ; *The People v. the Bank of Niagara*, 6 Cow. (N. Y.) R. 196. For forms of demurrers and joinder, see 6 Wentw. Plead. 113, 106, 62, 52, 152 ; *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 265 ; 4 Cow. (N. Y.) R. 148, 149. For forms of rejoinders, see 6 Wentw. Plead. 58, &c. ; *State v. Foster*, 2 Halst. (N. J.) R. 103 ; 4 Cow. (N. Y.) R. 119, n. a. ; *The People v. The Bank of Niagara*, 6 Cowen, (N. Y.) R. 200, 201. For forms of joinders in demurrer, see the *People v. Utica Ins. Co.* 14 Johns. (N. Y.) R. 365 ; 6 Wentw. Plead. 114, 62, 52, 152, &c. For form of surrejoinder, see 6 Wentw. Plead. 58 ; 4 Cow. (N. Y.) R. 119, n. a.

² *State v. Buchanan, Wright*, (Ohio) R. 233.

³ *Ibid.*

⁴ *Rex v. Amery*, 1 T. R. 368 ; *Rex v. St. Mary*, 7 T. R. 735 ; 3 Wood. Lect. 341.

⁵ *Rex v. Whitchurch*, 8 Mod. 211 ; *Rex v. Amery*, 1 T. R. 364, n. 367.

⁶ *Commonwealth v. Smead*, 11 Mass. R. 74 ; see *Cutts v. Commonwealth*, 2 Mass. R. 284.

granted on an information when a verdict had been rendered for the defendant, because it was then thought that this was a criminal proceeding, yet since it has been settled that it is in substance but a civil action, new trials, it is well established, may be granted, even after a trial at bar.¹ It has been held, however, in Connecticut, that a new trial will not be granted for misdirection, where it appears that the defendant's term of office had expired, and a new election of officers made.² Though there be verdicts and judgment on demurrer for the defendant on all of his pleas, it is good cause for arrest of judgment, on motion, that by his own showing on the record he has no title to the office.³ It is, however, no cause for motion in arrest of judgment, that from the whole record it appears that the defendant has a good title, when in his plea he has wholly relied upon another title, which he has failed to establish; ⁴ and judgment in such case cannot be given for him.⁵ And if one material issue be found against the defendant, showing that he has no title, though several be found for him, the judgment must be for the king or people.⁶

Under the old writ of *quo warranto*, where the franchise usurped might be repossessed and enjoyed by the crown, the judgment was a judgment of seizure into the king's hands, and is here into the State's hands; ⁷ and in case of an information, if it extend to

¹ *Rex v. Francis*, 2 T. R. 484; *Rex v. Ellames*, 7 Mod. 224; S. C. C. T. H. 48; *Rex v. Bennet*, 1 Stra. 105; *Musgrave v. Nevinston*, 1 Stra. 584; S. C. 2 Ld. Raymd. 1358; *Rex v. Bell*, 2 Stra. 995, 1105; *Smith Dormer v. Parkhurst*, 2 Stra. 1105; *Rex v. Blunt*, Sayer, 102; *Gay v. Crop*, 7 Mod. 37; *Bright v. Eynon*, 1 Burr. 395; *Rex v. Jones*, 8 Mod. 208; *Rex v. Corporation of Brecknock*, 8 Mod. 208; 3 Wood. Lect. 355; 2 Kyd on Corp. 445; *The Commonwealth v. Woelper, et al.* 3 Serg. & Rawle, (Penn.) R. 29.

² *The State v. Tudor*, 5 Day's (Conn.) Cas. in Error, 329.

³ *Rex v. Nance*, 7 Mod. 341.

⁴ *Rex v. Leigh*, 4 Burr. 2145.

⁵ *Symmers v. Regem*, Cowp. 506.

⁶ *Rex v. Leigh*, 4 Burr. 2145; *Rex v. Hebden*, Andr. 391.

⁷ *Rex v. Hertford*, 1 Ld. Raymd. 426; *Strata Marcella*, 9 Co. 25, b.; *Rex v. Hearle*, 1 Stra. 627; *State v. Ashley*, 1 Pike, (Arkan.) R. 304, 305; and see *State Bank v. State*, 1 Blackf. (Ind.) R. 278; *The People v. Hudson*

seizure of the *property* of the corporation, the inquiry being concerning the forfeiture of corporate rights, that part of the judgment is erroneous.¹ The corporation may be thus dissolved; but the *judgment* of seizure, it seems, does not effect the dissolution; the corporation continues to exist until the franchises are seized on execution.² But where the franchise cannot be possessed and enjoyed by the king or people, as in case of a corporation, or corporate office, the judgment on the information, whether at common law, or under the statute of Anne, must be of ouster of the person or persons usurping the franchise or office, and of fine for the misdemeanor.³ It has been decided in Indiana, that the clause in the constitution of that State, which provides "that no man's property shall be taken for public use without consent of his representatives," does not prohibit a judgment of seizure of the franchises of a corporation for a violation of its charter, whatever may be the effect of the judgment upon private property.⁴ If the defendant's title be defective in fact, as, if being duly qualified and elected he has not been legally admitted, the judgment against him must be absolute, and cannot, as was once thought, be *quousque*, that is, until he shall be legally admitted.⁵ If the

Bank, 6 Cow. (N. Y.) R. 217, that this is the judgment in such cases in informations in the nature of *quo warranto*.

¹ *State Bank v. State*, 1 Blackf. (Ind.) R. 278.

² *Ibid.*

³ *Rex v. Cusack*, 2 Rol. 115; *Virginia Company*, 2 Rol. 445; *Rex v. Dublin*, Palm. 1; *Strata Marcella*, 9 Co. 25, b.; *Rex v. Hertford*, 1 Ld. Raymd. 426; *Smith's Ca.* 4 Mod. 58; S. C. 1 Show. 278, 280; *Rex v. Grosvenor*, 7 Mod. 199; 2 Barnard, 391; *Rex v. Hearle*, 1 Stra. 627; *Symmers v. Regem*, Cowp. 510; *Rex v. Carmathen*, 2 Burr. 869; S. C. 1 W. B. 187; *Rex v. Amery*, 2 T. R. 567; *Rex v. Pasmore*, 3 T. R. 244; *Rex v. Courtenay*, 9 East, 267; *Commonwealth v. Union Ins. Co. in Newburyport*, 5 Mass. R. 231, 232, per Parsons, C. J.; *The Commonwealth v. Woelper et al.* 3 Serg. & Rawle, (Penn.) R. 52; *The People v. Utica Ins. Co.* 15 Johns. (N. Y.) R. 386; *State v. Ashley*, 1 Pike, (Arkan.) R. 305. For form of judgment, see *Hoblyn v. Regem*, 6 Bro. P. C. 517; In New York, 1 R. L. 108, § 5.

⁴ *State Bank v. State*, 1 Blackf. (Ind.) R. 278.

⁵ *Rex v. Pindar*, 8 Mod. 235; S. C. *Rex v. Serle*, 8 Mod. 332; S. C. *Rex v. Hall* 11 Mod. 391; S. C. *Rex v. Hearle*, 1 Stra. 627; *Rex v. Reeks*, 2

defendant since his usurpation has been duly elected and admitted, or if his office has long expired, or been relinquished by him, judgment must be for the fine only.¹ And though the office has expired when judgment on the right of the parties comes to be pronounced, the court will proceed and pronounce judgment, in New York, as there the relators, if successful, are entitled to costs.² The fine imposed on the defendant is usually nominal; though in cases of gross misconduct a heavy penalty will be imposed.³ As the fine is usually nominal, its omission in judgment of seizure of franchises cannot be assigned by a corporation for error, especially as the omission is manifestly for the benefit of the corporation.⁴ If the judgment be against persons for assuming to act as a corporation, when in fact no such corporation was ever created, the judgment is, "that it shall be extinguished, and forbids the usurpers from exercising the franchise again."⁵ Upon the writ of *quo warranto* the judgment *for the defendant*, inasmuch as it was upon the mere right, was conclusive upon the crown; and upon writ and information judgment *for the crown* is conclusive. But even after judgment for the defendant upon an information, another information may be granted to impeach his title.⁶ A judgment of ouster may be given in evidence, without being pleaded, by parties and all others, on an issue involving the rights upon which it is passed.⁷ Upon disclaimer, judgment is immediately rendered for the king or people.⁸ The statutes of

Ld. Raymd. 1447; *Symmers v. Regem*, Cowp. 510; *Rex v. Clarke*, 2 East, 83; *Rex v. Courtenay*, 9 East, 267.

¹ *Rex v. Biddle*, 2 Stra. 952; *S. C. Rex v. Taylor*, 7 Mod. 172; *S. C. 2 Barnard*, 238, 281.

² *People v. Loomis*, 8 Wend. (N. Y.) R. 396.

³ *Rex v. Cracker*, 8 Mod. 286; *The Commonwealth v. Woelper et al.* 3 Serg. & Rawle, (Penn.) R. 52.

⁴ *State Bank v. State*, 1 Blackf. (Ind.) R. 270.

⁵ *Smith's Ca.* 4 Mod. 58; *S. C. 1 Show*, 278, 280; and see *Corporation of Dublin*, 1 Palm. 1, 9.

⁶ *Strata Marcella*, 9 Co. 28; *Anon.* 12 Mod. 225; *Rex v. Trinity House*, 1 Sid. 86; *Rex v. Carpenter*, 2 Show. 47; *Utica Ins. Co. v. Scott*, 8 Cowen, (N. Y.) R. 720, 721, per Colden, Senator.

⁷ *Utica Ins. Co. v. Scott*, 8 Cow. (N. Y.) R. 709.

⁸ *Co. Ent.* 527, b.; 2 Kyd on Corp. 407.

amendments and jeofails, both in England and New York, are extended to all the proceedings on informations in the nature of *quo warranto*; ¹ and in Pennsylvania, whether the statute of 1806 applies or not, the court will in their discretion allow the pleadings to such informations to be amended. ²

On informations in the nature of a *quo warranto*, at common law, neither party could recover costs; ³ and cannot at this day, in England, in cases not within the statutes. ⁴ In New York, it

¹ 9 Anne, c. 20, § 7; 1 R. L. (N. Y.) 117, 121, § 10; *People v. Clark*, 4 Cow. (N. Y.) R. 95; and see *Ibid.* 119, n. a. For decisions under the English statute, see *Rex v. Bazey*, 4 M. & S. 255; *Symmers v. Regem*, Cowp. 506; *Rex v. Symmons*, 4 T. R. 224; *Rex v. Wynne*, 2 M. & S. 347, n.; *Rex v. Armstrong*, Andr. 109; *Attorney General v. Trinity House*, 1 Sid. 54; *Rex v. Ellames*, 7 Mod. 224; S. C. 2 Stra. 975; S. C. C. T. H. 42, 50; S. C. Cunningham, 44; *Rex v. Phillips*, 1 Kenyon, 539; S. C. 1 Burr. 304; *Rex v. Birch*, 4 T. R. 610; *Phillips v. Smith*, 1 Stra. 136. For pleading *de novo*, *Rex v. Grimes* and *Rex v. Blatchford*, 4 Burr. 2147; 4 Cow. (N. Y.) R. 120. When no replender, *Rex v. Leigh*, 4 Burr. 2145; *Symmers v. Regem*, Cowp. 506. Judgment amended, *Tufton and Ashley*, Cro. Car. 144; *Rex v. Amery*, 1 Anstr. 183. For New York Practice as to rule for pleading, *People v. Richardson*, 3 Cow. (N. Y.) R. 357; execution, 4 Cow. (N. Y.) R. 122, n. a.; writ of error, *ibid*; return, *ibid*; trial and evidence, 4 Cow. (N. Y.) R. 119, n. a.; bill of exceptions, 4 Cow. (N. Y.) R. 120, n. a.; *postea*, *ibid*; consolidation, *ibid.* 109, n. a.; quashing information, *ibid*; of the process, *ibid.* 109, 111; how defendant shall be named, *ibid.* 111, n. a.; teste and return of process, *ibid*; of issues of *distringas*, *ibid*; of seizure *nomine districtionis* for non-appearance, *ibid*; whether defendant can be pursued to outlawry, *ibid.* 112, n. a.; who may defend, *ibid*; time to plead, *ibid*; imparlance, *ibid.* 113, n. a.; of affidavits on which motion for leave, &c. is founded, *ibid.* 105, n. a.; rule thereupon, *ibid.* 106, n. a.; rule to inspect books, *ibid*; of affidavits on showing cause, *ibid*; showing cause, *ibid*; form of rule to appear, *ibid.* 384; special verdict allowed preference in an argument on calendar, *ibid.* 297; costs, *ibid.* 120, 122, n. a. The general rules of court in relation to pleading, amendments, &c., are applicable, in New York, to proceedings upon informations in the nature of *quo warranto*. *People v. Clark*, 4 Cow. (N. Y.) R. 95.

² *Commonwealth v. Gill*, 3 Whart. (Penn.) R. 236.

³ *The Commonwealth v. Woelper et al.* 3 Serg. & Rawle, (Penn.) R. 52.

⁴ *Rex v. Williams*, 1 Burr. 402; S. C. 1 W. B. 93; *Rex v. Wallis*, 5 T. R. 380; *Rex v. Richardson*, 9 East, 469; *Rex v. Hall*, 1 B. & C. 237; *Rex v. McKay*, 5 B. & C. 641; English Statutes with regard to costs, see inform-

seems, that costs are recoverable ; though a defendant, against whom an information has been filed, cannot, if successful, recover double costs.¹

ations, 9 Anne, c. 20, § 5 ; 4 and 5 Wm. & Mary, c. 18, § 2, 6 ; 32 Geo. 3, § 1.

¹ People v. Loomis, 8 Wend. (N. Y.) R. 396 ; People v. Adams, 9 Wend. N. Y.) R. 464.

CHAPTER XXII.

OF THE DISSOLUTION AND REVIVAL OF A CORPORATION.

§ 1. In England, it has been much questioned, whether a municipal corporation could be dissolved except by the death of all the people in the place, or, it may be, by act of parliament. There is certainly nothing in the nature of corporations of this kind which renders them incapable of dissolution; and the only substantial difficulty seems to be, the hardship of making the local government and privileges of the *many* dependent upon the acts or neglects of the *few*, who usually enjoy the principal franchises, and fill the offices, of municipal corporations.¹ It is evident that this objection applies with less force to private corporations, many of which, in our own country, are little more than limited partnerships, every member exercising through his vote an immediate control over the interests of the body. Indeed, the general force of the objection is almost done away by the fact, that even those who contend for the indissolubility of municipal corporations admit, that they may be *suspended*, or practically dissolved; that the members cannot enjoy the principal advantages of incorporation without a renovating grant from the sovereign power.² By far the better opinion at the present day, as we shall have occasion to consider, is, that even municipal bodies may be dissolved, and their privileges and franchises granted to a new, or to the *old set of corporators*. In England, a corporation may, at least to all practical purposes, be dissolved, first, by act of parliament; secondly, by the loss of all its members, or of an integral part, by death or otherwise; thirdly, by the surrender of

¹ Willcock on Mun. Corp. 325, 326.

² Ibid. 327.

its franchises ; and fourthly, by forfeiture of its charter, through negligence or abuse of the privileges conferred by it.¹

§ 2. By the theory of the British constitution, parliament is omnipotent ; and hence an act of that body would undoubtedly be effectual to the dissolution of a corporation.² It is to the honor of the British nation, however, that this power, restrained by public opinion, rests mainly in theory ; and except in the instances of the suppression of the order of Templars in the time of Edward the second,³ and of the religious houses in the time of Henry the Eighth,⁴ we know of no occasions on which parliament have thought proper to dissolve, or confirm the arbitrary dissolution of corporate bodies. When, in 1783, a bill was introduced for the purpose of remodelling the charter of the East India Company, it was opposed by Mr. Pitt and Lord Thurlow, not only as a dangerous violation of the charter of the company, but as a total subversion of the law and constitution of the country. In the nervous language of the latter, it was “an atrocious violation of private property, *which cut every Englishman to the bone.*” Indeed some of the greatest jurists and judges of England have not hesitated to declare, that an act of parliament against common right and natural equity is void.⁵ Corporate property and fran-

¹ 2 Kyd on Corp. 446, et seq. ; Willcock on Mun. Corp. 325, et seq. ; 1 Black. Comm. 485 ; 2 Kent, Comm. 245 ; Boston Glass Manufactory v. Langdon & Trustee, 24 Pick. (Mass.) R. 52.

² 1 Co. Lit. 176, n. ; 1 Black. Comm. 160, 485 ; 2 Kyd on Corp. 446, 447 ; Vanhorne's lessee v. Dorrance, 2 Dallas, (Penn.) R. 307, 308, per Patterson, J. ; Dartmouth College v. Woodward, 4 Wheat. R. 643, per Marshall, C. J. ; 2 Kent, Comm. 248.

³ See Sawyer's Arg. Quo Warranto, 13 ; 2 Kyd on Corp. 446.

⁴ 1 Hallam's Const. Hist. of England, 94, et seq. Some of the great foundations were held to fall, against every principle of law, by the attainder of their abbots for high treason ; and these illegal forfeitures were confirmed by act of parliament. The smaller convents, whose revenues were less than £200 a year, were suppressed by act of parliament, to the number of three hundred and seventy-six, and their estates vested in the crown. Ibid. 97.

⁵ Bracton, L. 4, fol. 228 ; Dr. Bonham's Case, 8 Co. 234, per Coke, C. J. ;

chises, important as they usually are in amount and extent, and undefended by the same strong sympathies which guard individual rights, offer a more tempting and easier spoil to misguided power, whether it reside in the prince or the people ; and we find a late elegant and critical historian regarding them as upon a different footing from the property and rights of private persons, and admitting the full right of the legislature to remould and regulate them in all that does not involve existing interests (as the interests of the successors) upon far slighter reasons of convenience.¹ It is a happy feature in the constitution of our own government, that the power of the legislatures of the different States resembles in this particular the prerogative of the King of Great Britain, who may create, but cannot dissolve a corporation, or, without its consent, alter or amend its charter.² In the tenth section of the first article of the Constitution of the United States it is declared, that, "no State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make any thing but gold and silver coin a tender in payment of debts ; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."³ Under this clause it has been settled, that the charter of a private corporation, whether civil or eleemosynary, is an executed contract between the government and the incorporators, and that the legislature cannot repeal, impair, or alter it, against the consent, or without the default of the corporation judicially ascertained and declared.⁴ A distinction was,

London v. Wood, 8 Mod. 687, 688, per Holt, C. J. ; Day v. Savage, Hob. R. 87, per Hobart, C. J.

¹ 1 Hallam's Const. Hist. of England, 101, 102.

² Rex v. Amery, 2 T. R. 568, 569 ; Sir James Smith's Case, 4 Mod. 54, 55, arg. ; Rex v. Pasmore, 3 T. R. 205, 206, arg. ; Dartmouth College v. Woodward, 4 Wheat. R. 657, 658, per Washington, J., 675, per Story, J. ; 2 Kyd on Corp. 447 ; 2 Kent, Comm. 248.

³ Constitution of the United States, Art. 1, § 10, 1.

⁴ Dartmouth College v. Woodward, 4 Wheat. R. 518 ; Fletcher v. Peck, 6 Cranch, 88 ; The State of New Jersey v. Wilson, 7 Cranch, R. 164 ; Terrett v. Taylor, 9 Cranch, 43 ; The Town of Pawlet v. Clark, 9 Cranch, 292 ; Wales v. Stetson, 2 Mass. R. 143 ; Enfield Toll

however, taken between private corporations, and public, such as counties, cities, towns, and parishes, which existing for public purposes only, the legislature have, under proper limitations, a right to change, modify, enlarge, or restrain, securing, however, the property to the use of those for whom it was purchased.¹ And corporations, created by the King of Great Britain previously to the revolution, are equally within the protection of the constitution with those since created by the different States ; for the dismemberment of empire, it is well settled, caused no destruction of the civil rights of individuals or corporate bodies.² But, it has been held, that a provision in the act of incorporation, which gave a summary process to a bank, was no part of its corporate franchises, but as the mere remedy, and not the right, might be repealed or altered at pleasure by the legislative will.³ And a law raising a commission to visit a bank, examine its officers, who are compelled to testify under a penalty, and if the bank is in a condition dangerous to the public, to apply to a justice of the Supreme Court for an injunction and the appointment of a receiver, is not unconstitutional on the ground, that a suspension of the proceedings of the bank by injunction diminishes the period for which the bank by charter is empowered to act, since this is but a process in the administration of justice.⁴ In consequence of

Bridge Co. v. Connecticut River Co., 7 Conn. R. 53, per Daggett, J.; *McLaren v. Pennington*, 1 Paige, (N. Y.) Chan. R. 107, per Walworth, Chan.; 2 Kent, Comm. 245, 246; *Green v. Biddle*, 8 Wheat. R. 1; *The Society for establishing useful Manufactures v. The Morris Canal & Banking Co.* per Chan. Williamson, cited Halst. Dig. 93.

¹ *Dartmouth College v. Woodward*, 4 Wheat. 694, 695, 659 to 664; *Hampshire v. Franklin*, 16 Mass. R. 76; 2 Kent, Comm. 245.

² *Dawson's lessee v. Godfrey*, 4 Cranch, R. 323; *Terrett v. Taylor*, 9 Cranch, R. 43; *Dartmouth College v. Woodward*, 4 Wheat. R. 518, 706, 707; *Society, &c. v. New Haven*, 8 Wheat. R. 481; *People of Vermont v. Society for propagating the Gospel*, 1 Paine, C. C. R. 653.

³ *Bank of Columbia v. Oakeley*, 4 Wheat. R. 245; and see *Young v. Bank of Alexandria*, 4 Cranch, R. 384; *McLaren v. Pennington*, 1 Paige, (N. Y.) Chan. R. 107, 108, per Walworth, Chan.; *Sturges v. Crowninshield*, 4 Wheat. R. 122.

⁴ *Commonwealth v. Farmers & Mechanics Bank*, 21 Pick. (Mass.) R. 542.

the construction that has been put upon the clause of the constitution above quoted, it has become usual for legislatures, in acts of incorporation for private purposes, to reserve to themselves a power to alter, modify, or repeal the charter at their pleasure ; and as the power of modification and repeal is thus made a qualifying part of the grant of franchises, the exercise of that power cannot of course impair the obligation of the grant.¹ And where the legislature has, under a general statute, reserved to itself power to wind up the concerns of banking corporations, those provisions of the statute calculated to apprise all interested of the fundamental change about to be wrought should be complied with, in order to give legal efficacy to the acts done under it ; otherwise the property of the corporation will not be divested, and its charter will continue in force.² It is obvious from the distressing consequences which ensue the dissolution of a corporation both to its members and creditors, that this reserved right of repeal is one, which, as a matter of policy as well as of justice, should be exercised with the greatest moderation and caution.

§ 3. It is very evident, that by the death of all its members a corporation aggregate is dissolved.³ And where from death or disfranchisement so few remain, that by the constitution of the corporation they cannot continue the succession, to all purposes of action at least, the corporation itself is dissolved.⁴ As long, however, as the remaining corporators are sufficient in number to continue the succession, the body remains ; as though all

¹ *Wales v. Stetson*, 2 Mass. R. 146, per Parsons, C. J.; *Dartmouth College v. Woodward*, 4 Wheat. R. 708, Story, J.; *McLaren v. Pennington*, 1 Paige, (N. Y.) Chan. R. 108, 109; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. R. 53, per Daggett, J.; 2 Kent, Comm. 246.

² *Farmers Bank of Delaware v. Beaston*, 7 Gill. & Johns. (Md.) R. 422.

³ 20 H. 6, 7; *Bro. Mortmain*; 1 Inst. 13, b.; 2 Kyd on Corp. 447, 448; *Canal Co. v. Rail Road Co.*, 4 Gill. & Johns. (Md.) R. 1; *Trustees of McIntire Poor School v. Zanesville Canal & Manuf. Co.*, 9 Ohio R. 203; *Penobscot Boom Co. v. Lamson*, 16 Maine R. 224; *Hodson v. Copeland*, Ibid. 314; *Boston Glass Manufactory v. Langdon & Trustee*, 24 Pick. (Mass.) R. 52.

⁴ 2 Kyd on Corp. 448.

the monks of an abbey died, yet if the abbot was alive, the corporation was not determined, since the abbot might profess others.¹

Municipal corporations have been held to be dissolved by omitting to elect their chief officer on the charter day, where he has no right to hold over, inasmuch as they had no power of afterwards electing one ;² and it was in consequence of these decisions that the statute of 11 Geo. 1, ch. 4, § 1, was enacted, which provides, that no corporation shall be dissolved or disabled to elect such officer on that account.³ These corporations have also been considered as dissolved by the loss of all or a majority of the members of any integral part, or select body, without which they cannot transact their municipal business, unless the power of restoration is vested in the subsisting parts of the corporation.⁴ In some cases, where municipal corporations in this condition have been under the consideration of the court, they have been spoken of as *suspended* rather than *dissolved*, their remaining members, as still continuing in the enjoyment of certain rights, and the crown, as being able by the appointment of a new set of officers to revive their activity, without reincorporating them.⁵ In the case of the *King v. Pasmore*,⁶ however, where the Court of King's Bench appear to have reviewed and considered the authorities on this point with great attention, it was held, that in such case the corporation was dissolved *to certain purposes*, that the personal privileges of its members were extinguished, and its property and franchises vested in the crown ; but that the franchises created by the crown did not merge in it or become extinguished,

¹ 11 Ed. 4, 4 ; 2 Kyd on Corp. 448.

² Sawyer's Arg. Quo Warrant. 21 ; 21 Ed. 4, 14 ; Banbury Ca. 10 Mod. 346 ; *Rex v. Pasmore*, 3 T. R. 245 ; *Rex v. Tregony*, 8 Mod. 129.

³ See 2 Kyd on Corp. 453, 454, 455 ; Willcock on Mun. Corp. 328, 329.

⁴ *Colchester v. Seaber*, 3 Burr. 1870 ; S. C. 1 W. B. 591 ; *Rex v. Pasmore*, 3 T. R. 241 ; *Rex v. Miller*, 6 T. R. 278 ; *Rex v. Morris*, 3 East, 216 ; 4 East. 26.

⁵ *Rex v. London*, 1 Show. 278, 280 ; *Colchester v. Seaber*, 3 Burr. 1870 ; S. C. 1 W. C. 591 ; *Scarborough v. Butler*, 3 Lev. 237.

⁶ 3 T. R. 241, 244 ; and see *Strata Marcella*, 9 Co. 25, b. ; 2 Kent, Comm. 248, 249.

but might be regranted to a new body of men, or be renovated in the old.

The principle, that a corporation is extinguished by the loss of one of its integral parts, appears to have been early applied to the case of a private corporation ; and it is laid down by Rolle, that if a corporation consist of so many brothers and so many sisters, and all the sisters die, the whole is dissolved, and all acts done, and all grants afterwards made by the brothers, are void ; because, says he, the brothers and sisters are integral parts of the corporation, *and it cannot subsist by halves*. But he adds, if the king make a corporation consisting of twelve men, to continue forever in succession, and when one of them dies, that the rest may elect another in his place ; though three or four of them die, yet all acts done by the remaining members are valid, because the members deceased did not constitute a distinct integral part.¹ From a reference to the cases, which have been cited, it will be seen, that the dissolution of a corporation from the loss of an integral part, whether the head officer or a select body, results from the incapacity of the corporation, in its imperfect state, to act, or to restore itself by a new election. Wherever therefore the corporation may restore itself by a new election, though until the new election the rights of the corporators may be suspended, yet they are not extinguished. Upon this principle the court of chancery in New York decided, that a *quasi* corporation of the owners or proprietors of certain drowned lands were not extinguished by their neglect to elect their commissioners, who were annual officers, at the time and place fixed by the act of incorporation ; but that at the period of the next annual election, they might meet and choose commissioners for the ensuing year, whether the old

¹ 1 Rol. Abr. 514 ; Com. Dig. Franchises, G. 4 ; and see *Rex v. Pasmore*, 3 T. R. 241, 243 ; *Phillips v. Wickham*, 1 Paige, (N. Y.) Chan. R. 596, where the case put by Rolle is recognised as law. See also 11 Ed. 4, 4 ; 2 Kyd on Corp. 448 ; *Slee v. Bloom*, 19 Johns. (N. Y.) R. 459 ; *Canal Co. v. Rail Road Co.* 4 Gill & Johns. (Md.) R. 1 ; *Trustees of McIntire Poor School v. Zaneville Canal & Manuf. Co.*, 9 Ohio R. 203 ; *Penobscot Boom Co. v. Lamson*, 16 Maine R. 224 ; *Hodson v. Copeland*, *Ibid.* 314.

commissioners held over in the mean time, or not.¹ "No act," says the Chancellor, "is required to be done by the commissioners, except to report their proceedings for the last year to the meeting; and if there were no commissioners, there could be no proceedings to report. The commissioners are not even required to preside at the meeting. There is nothing in the nature of the duties to be performed, which necessarily requires a continued succession of commissioners."²

Private corporations aggregate, as they are constituted in this country, are to be distinguished from the municipal corporations of England, in this, that they are not, in general, composed of integral parts. The stockholders compose the company, and the managers, or directors and officers, are their agents, necessary for the management of the affairs of the company, but not essential to its existence as such, and not forming an integral part. The corporation exists *per se*, so far as is requisite to the maintenance of perpetual succession, and the holding and preserving of its franchises. The non-existence of the managers, does not suppose the non-existence of the corporation. The latter may be dormant, its functions may be suspended for want of the means of action; but the capacity to restore its functionaries by means of new elections may remain. There is no reason why the power of action may not be revived by a new election of the managers and officers, competent to carry on the affairs of the corporation, conformably to the directions of its charter. When therefore the election of its managers, directors, or other officers, is by charter to be conducted solely by the stockholders, the charter or act of incorporation not requiring the managers, directors, or other officers to preside at, or to do any act in relation to the election, a failure to elect such officers on the charter day will not dissolve the corporation, but the election of officers may take place on the next charter day without any new legislative aid.³

¹ *Phillips v. Wickham*, 1 Paige, (N. Y.) Ch. R. 590.

² *Ibid.* 597.

³ *Rose v. Turnpike Company*, 3 Watts, (Penn.) R. 46; *Weir v. Bush*, 4 Litt. (Ky.) R. 433; *Blake v. Hinkle*, 10 Yerg. (Tenn.) R. 218; *Lehigh Bridge Company v. Lehigh Coal Company*, 4 Rawle, (Penn.) R. 9; *Smith v.*

§ 4. Another mode in which a corporation may be dissolved is, by the surrender of its franchise of being a corporation into the hands of the government. The power of a municipal corporation to surrender its corporate existence has, however, in England, been much questioned.¹ In the cases cited by those who deny the right, the question seems, in general, to have been upon the validity of the mode of surrender, or upon the terms of the instrument,² rather than upon the power of a corporation to dissolve itself in this way; and by far the better opinion is, that where the surrender is duly made and accepted, it is effectual to dissolve a municipal body.³ In this country, the power of a private corporation, to dissolve itself by its own assent, seems to be assumed by all judges who touch upon the point;⁴ but in South Carolina, it has been adjudged, that the officers of a corporation could not dissolve it, without the assent of the great body of the society.⁵ In England the mode of surrender is by deed to the king; and as

Natchez Steamboat Company, 2 Howard, (Miss.) R. 478; *Phillips v. Wickham*, 1 Paige, (N. Y.) Ch. R. 590; *Russell v. McClellan*, 14 Pick. (Mass.) R. 63.

¹ Treby's argument, *Quo warranto*, 10, 11, 12, 13, &c.; 1 Kyd on Corp. 1, 9, 10; *Rex v. Amery*, 2 T. R. 531, 532, *arguendo*; *Rex v. Grey*, 8 Mod. 361.

² *Case of Dean and Chapter of Norwich*, 3 Co. 73; S. C. 2 Ander, 165; *Hayward and Fulcher*, Sir W. Jones, 166; S. C. Palm. 491; *Butler v. Palmer*, 1 Salk. 191; *Rex v. Bridgewater*, 11 Mod. 291.

³ *Rex v. Miller*, 6 T. R. 277; *Rex v. Haythorne*, 5 B. & C. 412, 425; *Rex v. Grey*, 8 Mod. 361; *Butler v. Palmer*, 1 Salk. 191; *Newling v. Francis*, 3 T. R. 196, 197; *Rex v. Holland*, 2 East, 72; *Rex v. Osborne*, 4 East, 335; 2 Kyd on Corp. 465, &c.; *Willcock on Mun. Corp.* 331, 332; 2 Kent, Comm. 249, 250.

⁴ *Riddle v. Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. R. 185, per Parsons, C. J.; *Hampshire v. Franklin*, 16 Mass. R. 86, 87; *McLaren v. Pennington*, 1 Paige, (N. Y.) Ch. R. 107, per Walworth, Chan.; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. R. 45, 46, 52; *Slee v. Bloom*, 19 Johns. (N. Y.) R. 456; *Canal Co. v. Rail Road Co.* 4 Gill & Johns. (Md.) R. 1; *Trustees of McIntire Poor School v. Zanesville Canal and Manuf. Co.* 9 Ohio R. 203; *Penobscot Boom Co. v. Lamson*, 16 Maine R. 224; *Hodson v. Copeland*, *Ibid.* 314; *Mumma v. Potomac Co.* 8 Peters, R. 281; 2 Kent, Comm. 250, 251.

⁵ *Smith v. Smith*, 3 Des. (S. C.) Ch. R. 557.

the king can take only by matter of record, the deed of surrender must be enrolled; it being no record without enrolment.¹ It seems that if a corporation, consisting of mayor, aldermen, and burgesses, surrender by the name of mayor, aldermen, and *capital* burgesses, the deed is void.² It is said, that when the effect of the surrender is to destroy the end for which the corporation or the corporate capacity was instituted, the corporation or the corporate capacity is itself destroyed.³ Thus, Lord Coke informs us, that if there be a warden of a chapel, and the chapel and all the possessions are aliened, he ceases to be a corporation, since he cannot be warden of nothing; yet, that it is otherwise with a prebendary, who has *stallum in choro et vocem in capitulo*, and is prebendary, although he have no possessions. And if an abbot, or a prior and convent sold all their possessions, the corporation remained, "*if they were the chapter to a bishop.*"⁴ Where a dean and chapter surrendered by deed enrolled "their church and all their possessions" to the king, it was held, that notwithstanding, the dean and chapter remained; for they were the bishop's chapter and council as long as the bishopric remained, and may be *without* possessions.⁵ Upon the same ground it was determined, that a dean and chapter were not dissolved by a surrender "of all their possessions, rights, liberties, privileges, and hereditaments, which they had in right of their corporation."⁶

In this country, where corporations are usually created by act of the legislature, no mode of surrender is pointed out by the books as *necessary*, differing from that in England, where corporations are usually created by charter from the crown. It is

¹ Butler v. Palmer, 1 Salk. 191; Rex v. Grey, 8 Mod. 361; 2 Kyd on Corp. 465, 466.

² Rex v. Bridgewater, 11 Mod. 292.

³ 2 Kyd on Corp. 445.

⁴ The Case of the Dean and Chapter of Norwich, 3 Co. 75, a.

⁵ Ibid.; S. C. 2 Anderson, 120, 165.

⁶ Hayward & Fulcher, Sir W. Jones, 166; S. C. Palm. 491; and see Rex v. Grey, 8 Mod. 358.

said that a surrender, if accepted, will be sufficient,¹ and that it is of no avail, until accepted.² But the mode in which it shall be made is no where specifically pointed out. An act of the legislature repealing the act of incorporation, passed with the assent of the corporation, would undoubtedly be sufficient ;³ but it is not dissolved, at least, so that it can avoid its contracts to employ an agent during the whole time it was established, by a vote of the majority of the members to dissolve it and close its concerns, and by transferring all its property to trustees, and giving notice to the executive department of the government, that the corporation claims no farther interest in the charter.⁴ It does not follow, it has been said, that a corporation is dissolved by the sale of its visible and tangible property for the payment of its debts, and by the temporary suspension of its business, so long as it has the moral and legal capacity to increase its subscriptions, call in more capital, and resume its business.⁵ And where a manufacturing corporation became insolvent, and assigned its property for the payment of its debts, the instrument of assignment providing that the assignees might use the name of the corporation for the collection of debts, and that the corporation would perform any further acts, which might be necessary to enable the assignees to execute the trust, and the corporation omitted for several years to hold meetings or to elect officers ; the by-laws, however, providing that the officers, though elected for one year, should continue in office until others should be chosen in their places, it was

¹ 2 Kent, Comm. 250 ; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. R. 45, 46 ; *Revere v. Boston Copper Co.* 15 Pick. (Mass.) R. 351.

² *Boston Glass Manufactory v. Langdon & Tr.* 24 Pick. (Mass.) R. 49.

³ *Riddle v. Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. R. 185, Parsons, C. J. ; *McLaren v. Pennington*, 1 Paige, (N. Y.) Ch. R. 107 ; *Dartmouth College v. Woodward*, 4 Wheat. R. 518 ; *Canal Co. v. Rail Road Co.* 4 Gill & Johns. (Md.) R. 1 ; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. R. 45 ; *Revere v. Boston Copper Co.* 15 Pick. (Mass.) R. 351 ; and see *Dyer*, 282 ; *Treby's Argument Quo Warranto*, 11 ; *Leon*, 234 ; 2 Kyd on Corp. 471, 472.

⁴ *Revere v. Boston Copper Co.* 15 Pick. (Mass.) R. 351.

⁵ *Brinckerhoff v. Brown*, 7 Johns. (N. Y.) Ch. R. 217 ; *State v. Bank of Maryland*, 6 Gill & Johns. (Md.) R. 205.

held, that the corporation had not been dissolved, so that a suit could not be brought and maintained in its name.¹ Nor is a corporation dissolved by one or two individuals becoming possessed, by purchase or otherwise, of all the shares of its stock, although this be accompanied by the omission of the corporation for two or more years to elect officers, or to do any other corporate act.² The stock, if every member should die at the same moment, would be distributed under the statute of distributions, or according to the testaments of the deceased. The legal representatives of the deceased members, would have authority by law to manage the corporation, and no dissolution would, in such case, take place; and if the shares should all centre in one man, and the forms of proceeding under the charter should require acts to be done by two or more, the owner could make sale of shares so as to conform to the letter of the rule.³ But if a corporation suffer acts to be done which destroy the end and objects for which it was instituted, it is equivalent to a surrender of its rights. This doctrine has been maintained and applied by the Courts of New York, in the construction of a statute of that State, concerning manufacturing corporations, which provides, that for all debts due and owing by the company, at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares or stock, and no farther.⁴ Under this statute, if a corporation, being indebted, suffer all its property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual election, and do no one act manifesting an intention to resume their corporate functions, the courts may, *for the sake of the remedy against the individual members, and in favor of creditors*, presume a virtual sur-

¹ *Boston Glass Manufactory v. Langdon and Trustee*, 24 Pick. (Mass.) R. 49.

² *Russell v. McClellan*, 14 Pick. (Mass.) R. 63; *Oakes v. Hill*, Ibid. 442; *Spencer v. Campion*, 9 Cowen, (N. Y.) R. 536; *Wilde v. Jenkins*, 4 Paige, (N. Y.) Ch. R. 481.

³ *Russell v. McClellan*, 14 Pick. (Mass.) R. 63.

⁴ *R. L.* (N. Y.) 247.

render of the corporate rights, and a dissolution of the corporation.¹ And an election of trustees, made after the insolvency of the company, for the mere purpose of keeping it in existence, will not prevent such dissolution.² In these cases, the courts of New York did not decide that the companies had lost all their rights, but, that even if they had a right to reorganize themselves, the case had happened in which, with regard to their creditors, they were dissolved.³

§ 5 The last mode, in which a corporation may be dissolved, is by a forfeiture of its charter judicially ascertained and declared. It was once doubted, whether the *being* of a corporation could be forfeited by a misapplication of the powers entrusted to it; but it is now well settled, that it is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated; and hence through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for a breach of trust.⁴ Even a clause

¹ *Slee v. Bloom*, 19 Johns. (N. Y.) R. 456; commented on in 2 Kent, Comm. 250, 251; *Penniman v. Briggs*, 1 Hopkins, (N. Y.) Ch. R. 300; S. C. 8 Cow. (N. Y.) R. 387.

² *Penniman v. Briggs*, 1 Hopkins, (N. Y.) Ch. R. 300; S. C. 8 Cowen, (N. Y.) R. 387. Whether mere insolvency would dissolve a corporation under this statute, *quere*. Ibid. per Spencer, Senator. Under the act of New York, providing for the dissolution of Insurance Companies, the Court of Chancery of that State exercise a discretion, as to decreeing a dissolution in the same manner, that the legislature would in such a case. It is not bound to decree a dissolution, simply because a majority of the directors and stockholders request it, though such a request would be deemed presumptive evidence that the interest of the stockholders would be promoted by a dissolution. *Matter of Niagara Ins. Co.* 1 Paige, (N. Y.) Ch. R. 258.

³ *Slee v. Bloom*, 19 Johns. (N. Y.) R. 475, 476, per Spencer, J.; *Penniman v. Briggs*, 1 Hopkins, (N. Y.) Ch. R. 305, per Sanford, Chan.; 2 Kent, Comm. 250, 251.

⁴ *Tailors of Ipswich*, 1 Rol. 5; *Rex v. Grosvenor*, 7 Mod. 199; *Sir James Smith's Case*, 4 Mod. 55, 58; S. C. 12 Mod. 17, 18; S. C. Skin. 311; S. C. 1 Show. 278, 280; *Rex v. Saunders*, 3 East, 119; *Case of City of London*, cited 2 Kyd on Corp. 474, &c.; *Rex v. Amery*, 2 T. R. 515; *Rex v. Pasmore*, 3 T. R. 246, per Buller, J.; *Terrett v. Taylor*, 9 Cranch, 51, 52, per

in the charter of a bank, that the corporation shall not be dissolved before the time specified in the charter, *unless all debts are paid*, does not protect the corporation from dissolution by *quo warranto*, for a violation of the charter; such clause being merely intended to prevent the corporation from dissolving itself before the expiration of the charter without paying its debts.¹ It is said that all franchises may be lost by non-user or neglect; and, as the strongest case of neglect, the case put is, where the parties are called upon in a court of justice to state their right, and neglect or refuse to do it.² It seems, that the mere omission by a corporation to exercise its powers does not, of itself, disconnected with any acts, work a forfeiture of the charter.³

The withdrawing of stock under the form of loans on private security, by a bank, with intent to reduce the effective capital of the institution below the amount required by the charter, may be good cause of forfeiture; although it is discretionary with the court, on proceedings to procure a forfeiture of the charter for such cause, whether it will declare the charter forfeit; and it will not do so, if no existing danger to the community requires it.⁴ The contract-

Story, J.; *Dartmouth College v. Woodward*, 4 Wheat. R. 658, 659; *The Commonwealth v. the F. & M. Ins. Co. in Newburyport*, 5 Mass. R. 230; *The People v. the Bank of Niagara*, 6 Cow. (N. Y.) R. 196; *The People v. the Washington and Warren Bank*, *ibid.* 211; *The People v. the Bank of Hudson*, *ibid.* 217; *Lehigh Bridge Co. v. Lehigh Coal Co.* 4 Rawle, (Penn.) R. 9; *State Bank v. State*, 1 Blackf. (Ind.) R. 270; *Canal Co. v. Rail Road Co.* 4 Gill & Johns. (Md.) R. 1; *Trustees of McIntire Poor School v. Zanesville Canal and Manufacturing Co.* 9 Ohio R. 203; *Penobscot Boom Corporation v. Lamson*, 16 Maine R. 224; *Hodson v. Copeland*, *Ibid.* 314; *Atchafalaya Bank v. Dawson*, 13 Louisiana R. 497; *People v. Manhattan Co.* 9 Wend. (N. Y.) R. 351; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) R. 371; *All Saints Church v. Lovett*, 1 Hall, (N. Y.) R. 198; *John v. Farmers and Mechanics Bank of Indiana*, 2 Blackf. (Ind.) R. 367; *Hamtranck v. Bank of Edwardsville*, 2 Missouri R. 169; *Day v. Stetson*, 8 Greenlf. (Me.) R. 372; 1 Black. Comm. 485; 2 Kyd on Corp. 474, &c.; *Willcock on Mun. Corp.* 334. And see authorities below.

¹ *State Bank v. State*, 1 Blackf. (Ind.) R. 270.

² *Rex v. Amery*, 2 T. R. 567, per Ashurst, J.

³ *The Attorney General v. the Bank of Niagara*, 1 Hopk. (N. Y.) Ch. R. 316, per Sanford, Chan.; *The Society, &c. v. the Morris Canal and Banking Co.* per Williamson, Chan., cited Halst. Dig. 93.

⁴ *State v. Essex Bank*, 8 Vermont R. 489.

ing of debts, or issuing of bills to a larger amount than the charter allows, or issuing with a fraudulent intention more paper than the bank can redeem, or embezzling large sums deposited for safe-keeping, or making large dividends of profits, while it refuses to pay specie for its bills, all subject a bank to the forfeiture of its charter.¹ The insolvency of a bank, and an assignment by it of so much of its property to trustees for the payment of its debts, as to prevent it from resuming banking business, the purpose for which the bank was instituted being thus defeated, though not, as we have seen *per se* a dissolution, is good cause of forfeiture on *quo warranto*.² In such case, the assignment may be alleged by the attorney general in general terms, without stating how much was assigned, or how much, or what value, was sufficient to disable the bank from resuming its operations.³ And where the replication in such case alleged, that the bank became insolvent by the fraud, neglect, or mismanagement of its officers or agents, or some of them, and that it stopped payment and discontinued its banking operations for several years; a rejoinder, admitting these facts, but averring that the bank, &c. resumed payment, and continued it ever since, was held to be sufficient.⁴

In general, to work a forfeiture, there must be something wrong, arising from wilful *abuse* or improper *neglect*, something more than *accidental negligence*, *excess of power*, or *mistake*, in the mode of exercising an acknowledged power. A single act of *abuser*, or *wilful non-feasance*, in a corporation, may be insisted on as a ground of total forfeiture; but a specific act of *non-feasance*, not committed *wilfully* or *negligently*, not producing nor having a tendency to produce mischievous consequences to any one, and not being contrary to any particular requisition of the charter, will not work a forfeiture.⁵ The duties assigned by an

¹ *State Bank v. State*, 1 Blackf. (Ind.) R. 270.

² *People v. Hudson Bank*, 6 Cow. (N. Y.) R. 217; *People v. Niagara Bank*, *Ibid.* 196.

³ *Ibid.*

⁴ *Ibid.*

⁵ *People v. Bristol and Rensselaerville Turnp. Road*, 23 Wend. (N. Y.) R. 222, Cowen, J.

act of incorporation are conditions annexed to the grant of the franchises conferred. Hence non-compliance with the requirements of an act incorporating a turnpike company, as to the construction of the road, is *per se* a *misuser* forfeiting the privileges and franchises of the company.¹ A *substantial* performance of conditions, however, is all that is required, whether they be conditions *precedent* or *subsequent*.² Long continued and wilful neglect, on the part of a turnpike company, to repair their road, is undoubtedly cause of forfeiture;³ but where a single instance of neglect in this respect is relied upon, *wilful* negligence must be averred and proved.⁴ If a bridge, necessary to render the road passable, be carried away by a sudden flood, such a company must rebuild it within a reasonable time, or they will forfeit their charter.⁵ The neglect of a bridge company to give a bond for the completion of the bridge within a limited time, as required by the charter, is not, it seems, of itself a cause of forfeiture.⁶ The favorable report of commissioners to view a turnpike road, under a general turnpike act, and the subsequent license of the governor to erect turnpike gates for the collection of tolls, are not a bar to an information in the nature of *quo warranto*, charging a non-compliance with the act of incorporation in the original construction of the road.⁷ An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise; but where a particular franchise is added to a corporation subsequently to its creation, such a franchise may be forfeited, and the residue remain.⁸

¹ *People v. Kingston and Middlesex Turnp. Road Co.* 23 Wend. (N. Y.) R. 193.

² *Ibid.*; *People v. Thompson*, 21 Wend. (N. Y.) R. 235; S. C. in *Error*; *Thompson v. People*, 23 *Ibid.* 537.

³ *State v. Royalton and Woodstock Turnp. Co.* 11 Vermont R. 431; *People v. Hillsdale and Chatham Turnp. Co.* 23 Wend. (N. Y.) R. 254.

⁴ *Ibid.*

⁵ *People v. Hillsdale and Chatham Turnp. Co.* 23 Wend. (N. Y.) R. 254.

⁶ *Enfield Toll Bridge v. Connecticut River Co.* 7 Conn. R. 28.

⁷ *Tar River Navigation Co. v. Neal*, 3 Hawks, (N. C.) R. 520; *People v. Kingston and Middlesex Turnp. Road Co.* 23 Wend. (N. Y.) R. 193, Cowen dissenting.

⁸ *People v. Bristol and Rensselaerville Turnp. Road*, 23 Wend. (N. Y.) R. 222, Cowen, J.

A cause of forfeiture cannot be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode, than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such a proceeding; since it may waive a broken condition of a compact made with it, as well as an individual.¹ An act of the legislature will not be deemed a waiver of conditions, and a confirmation of the charter, unless the intent of the legislature in that respect be expressly declared, or is necessarily to be implied from the provisions of the act.² And though a forfeiture incurred by a corporation by non-performance of a condition in its charter may be waived by the legislature by subsequent legislative acts, recognising the continued existence of the corporation, yet this doctrine does not apply, if, by the terms of the charter, the estate or franchise absolutely determines on failure to perform the condition.³ But where the terms of a charter are, that the corporation shall

¹ *Rex v. Stevenson*, Yelv. 190; *Rex v. Carmarthen*, 1 W. Blk. 187; S. C. 2 Burr. 869; *Rex v. Amery*, 2 T. R. 515; *Rex v. Pasmore*, 3 T. R. 244; *Terrett v. Taylor*, 9 Cranch, R. 51; *The People of Vermont v. The Society for Propagating the Gospel*, 1 Paine, C. C. R. 653; *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Chan. R. 379, 381; *Slee v. Bloom*, 5 Johns. (N. Y.) Chan. R. 366, 380; S. C. 19 Johns. (N. Y.) R. 456; *Vernon Society v. Hills*, 6 Cowen, (N. Y.) R. 23; *The President, &c. of the Kishacoquillas & Centre Turnp. Road Co. v. McConaby*, 16 Serg. & Rawle, (Penn.) R. 145, per Duncan, J.; *The Commonwealth v. The F. & M. Ins. Co. in Newburyport*, 5 Mass. R. 230; *Chester Glass Co. v. Dewey*, 16 Mass. R. 94; *The Society &c. v. The Morris Canal and Banking Co. per Williamson*, Chan. cited Halst. Dig. 93; *Enfield Toll Bridge Co. v. The Connecticut River Co.*, 7 Conn. R. 46; *The Banks v. Poitiaux*, 3 Rand. R. 142, per Green, J.; *Canal Co. v. Rail Road Co.*, 4 Gill. & Johns. (Md.) R. 1; *Atchafalaya Bank v. Dawson*, 13 Louisiana R. 497; *Moler v. Webb*, 8 Ohio R. 552; *State v. Mayor & Aldermen of Savannah*, R. M. Charlton's, (Ga.) R. 342; *Buncombe Turnp. Co. v. McCarron*, 1 Dev. & Bat. (N. C.) R. 306; *John v. Farmers & Mechanics Bank*, 2 Blackf. (Ind.) R. 367; *Boston Glass Manufactory v. Langdon & Trustee*, 24 Pick. (Mass.) R. 52, 53; 2 Kent, Comm. 251.

² *People v. Kingston & Middlesex Turnp. Co.* 23 Wend. (N. Y.) R. 193.

³ *People v. Manhattan Co.*, 9 Wend. (N. Y.) R. 351; *Commonwealth v. Union Fire & Marine Insurance Co.* 5 Mass. R. 232.

be dissolved on non-performance of a condition, the mere failure to perform is not *ipso facto* a dissolution, but judicial proceedings, and a judgment of ouster must be had, in order to effect a dissolution.¹ The proceeding to dissolve a corporation must be instituted in the country, where the corporation is located; for neither the courts nor legislatures of this country can adjudge a forfeiture of the property or franchises of a foreign corporation.² The forfeiture of a charter can be enforced in a court of law only; for though a court of chancery may hold trustees of a corporation accountable for abuse of trust, it cannot divest it of its corporate character and capacity;³ unless, indeed, as is the case in New York, it be specially empowered by statute.⁴

The mode of proceeding against a corporation to enforce a repeal of the charter, or a dissolution of the body, for cause of forfeiture, is by *scire facias*, or an information in the nature of a *quo warranto*. "A *scire facias*," says Mr. Justice Ashurst, "is proper where there is a legal existing body, capable of acting, but who have been guilty of an abuse of the power entrusted to them;"⁵ and a *quo warranto* is necessary, where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution, they cannot legally exercise the power they affect to use."⁶ It would seem,

¹ *People v. Manhattan Co.*, 9 Wend. (N. Y.) R. 351; *Bank of Niagara v. Johnson*, 8 Wend. (N. Y.) R. 645; *Bear Camp River Co. v. Woodman*, 2 Greenl. (Me.) R. 404.

² *Society, &c. v. New Haven*, 8 Wheat. R. 483, 484; *The People of Vermont v. The Society for Propagating the Gospel*, 1 Paine, C. C. R. 653.

³ *The King v. Whitwell*, 5 T. R. 85; *Attorney General v. Reynolds*, 1 Eq. Cas. Abr. 131, pl. 10; 3 Johns. (N. Y.) R. 134, per Van Ness, J.; *Slee v. Bloom*, 5 Johns. (N. Y.) Chan. R. 380; *Attorney General v. Utica Ins. Co.*, 2 Johns. (N. Y.) Chan. R. 376, 378, 388; *Attorney General v. Earl of Clarendon*, 17 Ves. 491.

⁴ L. (N. Y.) sess. 40, ch. 146, and sess. 44, ch. 148; and sess. 48, ch. 325.

⁵ *Rex v. Pasmore*, 3 T. R. 244; and see *Smith's Case*, 4 Mod. 57; *Rex v. Wynne*, 2 Barnard, 391.

⁶ *Rex v. Pasmore*, 3 T. R. 244, 245, and see Chap. 21.

however, that an information in the nature of *quo warranto* would lie against a legally existing corporation for an abuse of its franchises, as well as a writ of *scire facias*.¹ Where a charter has been granted upon an erroneous consideration, or been fraudulently obtained, or is otherwise voidable, either in whole or part, it may be repealed entirely, or as to the voidable part only, without affecting the remainder, by proceedings in *scire facias*. If, however, the charter is absolutely void, this process is unnecessary; for a void charter can afford no justification to any one acting under it.² The process seems to be unnecessary, where the corporation is absolutely dissolved, by the loss of an integral part.³ A charter will not be avoided merely because it refers to a preceding charter as valid, which in fact was void, unless it be founded on such charter;⁴ nor if the facts stated by the grantees be true, though the king be mistaken in his inference of the law.⁵ And it is said, that if a corporate election be not made as the letters patent appoint, these may be repealed by *scire facias*; for all franchises are granted on condition that they shall be duly executed according to the grant.⁶ Where a demurrer was put into a writ of *scire facias*, it was held, that its legal effect was the same as that of a demurrer to the declaration; for a declaration upon a *scire facias* is no more than a copy of the writ.⁷ And

¹ 1 Black. Comm. 485; and see Case of City of London, cited 2 Kyd on Corp. 474 to 486, 487; The People v. The Bank of Niagara, 6 Cowen, (N. Y.) R. 196; The People v. The Bank of Hudson, *ibid.* 217; The People v. The Washington & Warren Bank, *ibid.* 211.

² Sackville College Cas. T. Ray. 178; Butler's Case, 2 Vent. 344; Rex v. Pasmore, 3 T. R. 244; 2 Chest. Case, 556; The President, &c. of the Kishacoquillas and Centre Turnp. Road Co. v. McConaby, 16 Serg. & Rawle, (Penn.) R. 145; and see the Earl of Rutland's Case, 8 Co. 55; Rex v. Kemp, 12 Mod. 78.

³ Canal Co. v. Rail Road Co., 4 Gill. & Johns. (Md.) R. 1.

⁴ Rex v. Haythorne, 5 B. & C. 426.

⁵ Rex v. Pasmore, 3 T. R. 249, per Grose, J.

⁶ London v. Vanacre, 12 Mod. 271, per Holt, C. J.; S. C. 1 Ld. Raymd. 499.

⁷ The People of Vermont v. The Society for Propagating the Gospel, 1 Paine, C. C. R. 660.

if one demurs to the whole writ or declaration in a *scire facias*, in which several breaches of the conditions of a grant are assigned, some sufficient, and some not, judgment must go against him; for he should have demurred only to such as are insufficient.¹ And this rule applies equally to a single count, part of which is good and part bad, when the matters are divisible in their nature.²

§ 6. At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion, in such an event, is a condition annexed by the law, inasmuch as the cause of the grant has failed.³ The personal estate, in England, vests in the king; and in our own country, in the people, or State, as succeeding to this right and prerogative of the crown.⁴ The debts due to and from it are totally extinguished; so that neither the members nor directors of the corporation can recover, or be charged with them in their natural capacities;⁵ according to that maxim of the Civil Law, "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"⁶ The common law, in this particular, is, however, frequently modified by charter or statute.⁷

§ 7. Where a corporation has been dissolved, in England, the

¹ Ibid.

² Ibid.

³ Co. Lit. 13, b. 102 b; Knight v. Wells, 1 Lut. 519; Edmunds v. Brown & Sillard, 1 Lev. 237; Attorney General v. Lord Gower, 9 Mod. 226; Pollexen's Arg. Quo Warrant. 112; Colchester v. Seaber, 3 Burr. R. 1868, arg.; Rex v. Pasmore, 3 T. R. 199; State Bank v. State, 1 Blackf. (Ind.) R. 267; 4 Black. Comm. 484; 2 Kyd on Corp. 516; 2 Kent, Comm. 246; see Chap. V. § 10, 2.

⁴ Ibid.

⁵ Edmunds v. Brown & Sillard, 1 Lev. 237; Rex v. Pasmore. 3 T. R. 241, 242; Colchester v. Seaber, 3 Burr. 1866; 1 Black. Comm. 484; 2 Kent, Comm. 246, 247.

⁶ Ff. 3, 4, 7.

⁷ 2 Kent, Comm. 247.

king may, either by grant,¹ or by proclamation under the great seal,² revive or renovate the old corporation, or by grant or charter create a new one in its place.³ And the old corporation may be revived with the old or a new set of corporators; and at the same time, new powers may be superadded.⁴ If the old corporation be revived, all its rights and responsibilities are of course revived with it; but if the grant operate as a new creation, the new corporation cannot be subject to the liabilities nor possess the rights of the old.⁵ An authorized merger of the rights of the old corporation in the new one by legislative act, is not such a dissolution of the corporation, as to throw back the real estate of the former upon the grantors,⁶ or to free the corporation from an obligation to pay its debts.⁷ It may become therefore a question of great practical importance, whether the charter be one of revival merely, or a charter of new incorporation. This is not to be determined by the collateral facts, that the name of both corporations, the new and the old, that the officers and a majority of the members, are the same, and that the business of the old corporation was for a time done, and its debts paid, by the new one. It is certainly true, says Mr. Justice Story, that a corporation may retain its personal identity, although its members are perpetually changing; for it is its artificial character, powers, and franchises, and not the natural character of its members, which constitute that identity. And for the same reason corporations may be

¹ *Rex v. Grey*, 8 Mod. 361, 362; *Rex v. Pasmore*, 3 T. R. 199.

² *Newling v. Francis*, 3 T. R. 189, 197, 198, 199.

³ *Colchester v. Seaber*, 3 Burr. 1870; S. C. 1 W. Blk. 591; *Rex v. Pasmore*, 3 T. R. 242; *Rex v. Amery*, 2 T. R. 569; *Scarboro' v. Butler*, 3 Lev. 387; *Luttrel's Case*, 4 Co. 87; *Lincoln & Kennebeck Bank v. Richardson*, 1 Greenl. (Me.) R. 79; 2 Kyd on Corp. 516.

⁴ *Rex v. Pasmore*, 3 T. R. 241, per Kenyon, C. J.

⁵ *Colchester v. Seaber*, 3 Burr. 1866; *Scarboro' v. Butler*, 3 Lev. 387; *Rex v. Pasmore*, 3 T. R. 241, 242, 246; *Luttrel's Case*, 4 Co. 87; *Bellews v. President, Directors and Company of the Hallowell and Augusta Bank*, 2 Mason, C. C. R. 43, per Story, J; *Union Canal Co. v. Young et al.*, 1 Whart. (Penn.) R. 410.

⁶ *Union Canal Co. v. Young et al.*, 1 Whart. (Penn.) R. 410.

⁷ *Hopkins v. Swansea Corporation*, 4 Mees. & Welsby (Ex.) R. 621.

different, although the names, the officers, and the members of each are the same." "To ascertain whether a charter create a new corporation, or merely continue the existence of an old one, we must look to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators."¹

¹ *Bellows v. President, Directors and Company of the Hallowell and Augusta Bank*, 2 Mason, C. C. R. 43, 44; *Wyman v. Hallowell & Augusta Bank*, 14 Mass. R. 58; and see *Rex v. Pasmore*, 3 T. R. 241, 242, 247, 248, 249.

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